Supreme Court, U. S.
FILED
MAR 29 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-1386

FRISCO LAND & MINING CO.,
a corporation,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST DISTRICT, DIVISION ONE, AFTER ENTRY OF ORDER BY SUPREME COURT OF THE STATE OF CALIFORNIA DENYING A HEARING

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Petitioner prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, First

District, Division One, entered on November 7, 1977.

OPINIONS BELOW

The opinions of the Marin County Superior Court in this case are unreported. The memorandum and minute order denying the State's Motion to Dismiss is set forth in Appendix E. The memorandum and minute order granting the State's Motion for Summary Judgment is set forth in Appendix D. The order dismissing Petitioner's complaint is set forth in Appendix C.

The order of the California Supreme Court denying a hearing is set forth in Appendix B. The opinion of the Court of Appeal of the State of California is reported at 74 Cal.App.3d 736; 141 Cal.Rptr. 810; and is set forth in Appendix A.

JURISDICTION

The judgment of the California Court of Appeal, set forth in Appendix A, was

entered on November 7, 1977. The order of the California Supreme Court denying a hearing was filed on January 4, 1978.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether merely for planning purposes the State of California can prevent the only use which Petitioner can make of its private property and yet not be liable in inverse condemnation for Petitioner's loss of the property resulting from its inability to put the property to any economic use?

2. Whether the State of California can, by legislative act, immunize itself and its agents from any liability under the Fifth and Fourteenth Amendments for taking private property without paying just compensation?

3. Whether Petitioner must exhaust

a futile administrative "remedy" after its property has been taken from it before suing the state for just compensation under the Fifth and Fourteenth Amendments?

4. Whether Petitioner was denied due process of law under the Fifth Amendment when an initiative statute establishing a regulatory commission and simultaneously preventing the only use which could be made of its property provided no administrative relief procedure whatsoever for five months after the statute became effective?

5. Whether it is a denial of equal protection of the law under the Fourteenth Amendment to attempt to compel donations of property for public use from Petitioner by denying building permits to third parties for the construction of houses?

6. Whether it is a denial of equal protection of the law under the Fourteenth

Amendment to impose a moratorium on all land use in a planning area when the effect on one owner, i.e. Petitioner, a residential subdivider who has encumbered its land to pay for residential improvements, is to deprive it of all economic benefits which can be derived from its land, directly resulting in its permanent loss through foreclosures, while the effect on other property owners in the same area is merely one of inconvenience or delay in development?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution

Amendment V

"No person shall...be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

Amendment XIV

"...nor shall any State deprive any person of life, liberty or property, with-

out due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes

California Government Code Sec. 818.4
Issuance, Denial, Suspension or Revocation of Permit, License, etc.

"A public entity is not liable for an injury caused by the issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked."

The California Coastal Zone Conservation Act of 1972 (formerly Public Resources Code Sections 27000 to 27650).[1]

Sec. 27400. Necessity of permit.

"On or after February 1, 1973, any person wishing to perform any development within the permit area shall obtain a permit authorizing such development from the regional commission and, if required by law, from any city, county, state, regional or local agency."

---

1. The 1972 Act was repealed by Section 27650 on January 1, 1977. (It was replaced, essentially, by The California Coastal Act, Public Resources Code Sections 30000 et seq.)

Sec. 27404. Vested rights.

"If, prior to November 8, 1972, any city or county has issued a building permit, no person who has obtained a vested right thereunder shall be required to secure a permit from the regional commission; ...Any such person shall be deemed to have such vested rights if, prior to November 8, 1972, he has in good faith and in reliance upon the building permit diligently commenced construction and performed substantial work on the development and incurred substantial liabilities for work and materials necessary therefor."

Sec. 27500. Civil fine.

"Any person who violates any provision of this division shall be subject to a civil fine not to exceed ten thousand dollars ($10,000)."

Sec. 27501. Additional penalties.

"In addition to any other penalties, any person who performs any development in violation of this division shall be subject to a civil fine not to exceed five hundred dollars ($500) per day for each day in which such violation persists."

STATEMENT OF THE CASE

This case was decided in the trial court on a Motion for Summary Judgment granted to the State of California by the Superior Court of Marin County and the following facts are undisputed:

In 1971 Petitioner acquired 550 acres of land located on the Pacific Ocean at Dillon Beach, Marin County, California. A portion of the land was then subdivided into 146 single-family lots and Petitioner spent over $500,000 on water, sewer, electrical and street improvements as required by local and state subdivision laws. Permits were obtained from eight local, state and federal agencies allowing the subdivision of the land and the sale of the lots, which commenced in June 1972. At this point, the only use which could be made of Petitioner's property was as sites for the construction of houses and Petitioner's annual payments

on a promissory note and assessment bonds, secured by liens on the property, were approximately $150,000 per year. (CT 303-305.)[1]

The California Coastal Zone Conservation Act of 1972, an initiative statute, became law on November 8, 1972 (hereinafter called "the 1972 Act"). The 1972 Act created a regulatory structure consisting of a State Commission and six Regional Commissions to plan for coastal conservation and to regulate coastal development during the planning period, which lasted until January 1, 1977. (Pub. Res. Code Sec. 27650). All construction of any kind was prohibited within the planning area

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1. References to CT are to the Clerk's Transcript on Appeal prepared by the Marin County clerk from the trial court proceedings and delivered to the California Court of Appeal, First District.

unless the development was exempt from regulation under Pub. Res. Code Sec. 27404 or a permit was obtained under Pub. Res. Code Sec. 27400. The penalty for constructing a house without an exemption or a permit was an initial fine not to exceed $10,000 (Pub. Res. Code Sec. 27500) and an additional fine not to exceed $500 per day for every day the violation persisted. (Pub. Res. Code Sec. 27501).

Between June and November 1972 Petitioner had sold approximately twenty lots to provide the cash flow to service its debts and to pay its real property taxes. (CT 3-4). Petitioner's lots became unusable and unsaleable on November 8, 1972, because they were then subject to regulation by a commission not yet formed. The North Coast Regional Commission (hereinafter called "the Commission"), having jurisdiction over Petitioner's land, was

not organized until February 1973. Forms for claiming an exemption were not even available until March 1973 and it was May 1973 before Petitioner could obtain any ruling on a claim for exemption filed with the Commission in the previous March. During this six months in which no administrative remedy was available to Petitioner its debts mounted precariously. (CT 3-7).

In May 1973 the Commission determined that Petitioner's subdivision was exempt from regulation pursuant to Pub. Res. Code Sec. 27404 but that Petitioner only had a vested right to complete the expenditure of $500,000 on subdivision improvements as required by its performance bond posted with the County of Marin. Simultaneously, the Commission held that the subdivision lots could not be put to their only use, i.e., the construction of houses, until permits were obtained from the Commission. (CT 306-308)

Petitioner then entered into a quagmire of dealings with the Commission seeking any relief it could obtain which would allow the third party lot owners to build houses so that Petitioner's lots could be sold and cash produced for the payment of its debts. From May 1973 until September 1973 the Commission refused to issue a permit, adding new proposed conditions every few weeks. This vacillation culminated on September 20, 1973, when the Commission adopted eight conditions for any permit, including a condition that Petitioner donate for public use a public access across property that Petitioner did not even own--a legal impossibility! Petitioner's property had been declared exempt from regulation under the 1972 Act and the Commission could only hope to impose new conditions on it by refusing to allow the property to be put to

its only use, i.e., as sites for houses. At this point, Petitioner was in default on all of its obligations, in arrears on its property taxes, its lots were totally unsaleable, and lien holders were threatening foreclosures. (CT 8-13, 308-311).

Petitioner's Complaint in inverse condemnation against the State of California was filed in Marin County Superior Court on May 20, 1974. The state demurred to the complaint on August 5, 1974. Petitioner's Opposition to Demurrer was filed on September 16, 1974. This was Petitioner's first opportunity to raise federal constitutional issues in the trial court and it did so in its brief arguing as follows:

> "The Fifth Amendment to the United States Constitution prohibits the taking of private property for public use without the payment of just compensation. The due process clause of the Fourteenth Amendment to the United States Constitution makes applicable to the states this federal constitutional principle of the Fifth Amendment. Chicago, B. & Q.

R. R. v. Chicago, (1897) 166 U.S. 226; Foster v. City of Detroit, (1966) 254 F.Supp. 655.

> There are therefore dual criteria which the Court must examine in determining whether there has been a damaging or taking of Plaintiff's property by Defendant and both state and federal cases must be examined." (CT 40 SS).

Petitioner also argued that the right to "possess, use and dispose" of its property was protected by the Fifth Amendment. (CT 40 XX). The trial court overruled the demurrer on October 9, 1974, stating that Petitioner had a cause of action for the taking of its property if it could prove that the Commission was withholding permits from third parties to impose conditions on Petitioner, citing Bydlon v. United States, 175 F.Supp. 891, as its authority. The trial court also held that Petitioner did not have an administrative remedy with regard to third party building permits and did not even need to exhaust administrative remedies if it could estab-

lish a cause of action in inverse condemnation. (CT 40 III-KKK). (Appendix E).

On July 7, 1975, the state filed a Motion for Summary Judgment. In its Points and Authorities in Opposition to the motion, Petitioner renewed its Fifth and Fourteenth Amendment arguments verbatim from its earlier brief. (CT 281). Six months later on December 30, 1975, the trial court reversed itself completely, holding that the 1972 Act was an interim measure and its effects could not constitute inverse condemnation, citing State of California v. Superior Court (Veta), 12 Cal.3d 237, 115 Cal.Rptr. 497. The trial court did not mention the Bydlon case, supra, which it had relied on in overruling the state's demurrer. (CT 342-344). (Appendix D).

On September 17, 1976, Petitioner filed its appellate brief in the California Court of Appeal, First District. Again Petitioner repeated verbatim its Fifth and Fourteenth Amendment arguments originally used in the trial court. Petitioner stressed that its right to "possess, use and dispose of its property" was protected by the Fifth Amendment, that the "forced donation" of property by Petitioner deprived it of equal protection of the law and that the unavailability of administrative remedies was a denial of procedural due process. The Court of Appeal rejected all of Petitioner's constitutional arguments on the basis that the state could impose a four-year moratorium on any construction within the coastal zone and that, therefore, the denial of building permits could not constitute a compensable taking regardless of the consequences to Petitioner. The court also held, in effect,

that the state permanently retained the right to require the dedication of private property to the public as a condition to the construction of homes on subdivision lots. When the Court of Appeal affirmed the trial court on November 7, 1977, Petitioner then petitioned the California Supreme Court for a hearing and renewed its federal constitutional arguments in its brief to that court. The hearing was denied on January 4, 1978.

REASONS FOR GRANTING THE WRIT

I

UNDETERMINED FEDERAL QUESTIONS

This case presents several federal constitutional questions which this Court has never answered.

These essential facts are undisputed: Petitioner subdivided land and spent over $500,000 on subdivision improvements so that it could sell lots to the

public. By reason thereof the only use which could be made of the lots was as sites for the construction of houses. The State of California prevented that use for planning purposes and, because of that prevention, Petitioner ultimately lost over $2,000,000 worth of lots through deed of trust and bond foreclosures.

Petitioner argued to the California Court of Appeal that the right to possess, use and enjoy its property was a property right protected by the Fifth Amendment, citing United States v. General Motors, 323 U.S. 373, 377-380, and United States v. Causby, 328 U.S. 256, 262. It further argued that numerous decisions of this Court and lower federal courts hold that government action which prevents the only use which can be made of property constitutes a compensable taking under the Fifth Amendment. United States v. Kansas

City Life Ins. Co., 339 U.S. 799; United States v. Causby, 328 U.S. 256; Bydlon v. United States, 175 F.Supp. 891; Highland Park, Inc. v. United States, 161 F.Supp. 597. The California Court of Appeal ignored this argument AND DID NOT EVEN DISCUSS THESE FEDERAL CASES. Its response was simply that the state could put a four-year moratorium on all uses of property without any liability for taking or damaging it. (Appendix A, p. 15). The Court of Appeal cited State of California v. Superior Court (Veta), 12 Cal.3d 237, 115 Cal.Rptr. 497, to support is position. The Veta case, supra, was the first case under the 1972 Act passing on the validity of a four-year moratorium on the use of property. It cited several California zoning cases as authority for the use of planning moratoriums but not one of those cases prevented all uses of private pro-

perty. Zoning cases universally leave the owner some use of his property.

Petitioner next argued that the prevention, just as a planning technique, of the only use which could be made of its property culminating in its loss through foreclosures, could not be justified as an exercise of the police power. It further pointed out that the only decisions of this Court permitting such a drastic use of the police power deal with prohibition of nuisances or involve the protection of public health, safety or morals as demonstrated in Northwestern Laundry v. City of Des Moines, 239 U.S. 486; Hadachek v. Sebastian, 239 U.S. 394; and Goldblatt v. Town of Hempstead, 369 U.S. 590. THERE NEVER HAS BEEN A DECISION OF THIS COURT WHICH JUSTIFIED THE USE OF THE POLICE POWER TO PREVENT THE ONLY USE WHICH COULD BE MADE OF PRIVATE PROPERTY

MERELY FOR ESTHETIC OR PLANNING PURPOSES. In similar situations the lower federal courts are expanding the protection of the Fifth Amendment, not decimating it. See Dahl v. City of Palo Alto, 372 F.Supp. 647, Bydlon v. United States, 175 F.Supp. 891; Drakes Bay Land Company v. United States, 424 F.2d 574; and Foster v. Herley, 330 F.2d 87.

Conversely, the absence of decisions from this Court has led the California courts to ignore the Fifth Amendment with regard to Petitioner's private property rights. The California courts abandoned any test of fairness or reasonableness or any balancing of equities between the state and Petitioner where merely planning legislation was involved. There is nothing in the record in this case even suggesting that building houses on Petitioner's subdivision lots would con-

stitute a nuisance; such a contention would be facetious. In view of the fact that Petitioner's subdivision was reviewed and approved in 1971 and 1972 by eight local, state, and federal agencies, could it be seriously maintained that such use of the lots would endanger the public health, safety or morals?

The Court of Appeal rejected these arguments on the basis that there was "no invasion or appropriation" of Petitioner's property rights. It then erroneously cited Mugler v. Kansas, 123 U.S. 623 and Goldblatt v. Hempstead, 369 U.S. 590, to support its position. (Appendix A, p. 55-57). Those cases only allow the police power to be used to prohibit the use of land where a nuisance or "public health, morals or safety" are involved.

Perhaps the most absurd holding of the California Court of Appeal is that

Petitioner cannot sue the state in inverse condemnation because the state has granted itself immunity by California Government Code Sec. 818.4. (Appendix A, p. 60). This is not the law. Legislative acts cannot abolish constitutional rights. Whether the enactment of a law and/or its administration constitute a taking of property without the payment of just compensation is a judicial question. See Eldridge v. City of Palo Alto, 57 Cal. App.3d 613, 618-621;, 129 Cal.Rptr. 575, 577-579 and cases cited. Equally absurd is the statement by the Court of Appeal that the state could not be liable for its unreasonable conduct because "the state has never taken any action to condemn the subdivider's property." (Appendix A, p. 52). The intention to formally condemn property is not a prerequisite to a property owner's right to sue for just

compensation for the taking of his property when such a taking occurs. Virtually every inverse condemnation case coming to an appellate court involves a factual situation where the government agency being sued had no intent to condemn the property.

Petitioner argued to the California Court of Appeal that the absence of any administrative remedy for over five months denied it due process of law and cited Fuentes v. Shevin, 407 U.S. 67, which holds that a person is denied due process if he is not given an opportunity for a hearing before a significant property interest is taken. It also cited the recent California case of Blair v. Pitchess, 5 Cal.3d 258, 96 Cal.Rptr. 42, because that case held that the California claim and delivery law violated the Fifth and Fourteenth Amendments because it de-

prived people of the "use" of their property without a hearing. In the instant case the only use of Petitioner's property was taken for over five months without a hearing. The feeble answer by the Court of Appeal was that the state did not have to furnish a hearing procedure because no action could be maintained during the four-year interim moratorium anyway. (Appendix A, p. 13). Fuentes v. Shevin, supra, and related cases were brushed off as not in point. (Appendix A, p. 45).

From May 1973 to September 1973 Petitioner attempted to obtain a permit so that its property could be put to its only use. By September 1973 Petitioner's property was already being taken, there was no hope of preventing deed of trust and bond foreclosures, so it abandoned the futile pursuit of administrative remedies and prepared to sue the state for taking

its property. In its brief to the Court of Appeal, Petitioner cited both federal and state cases which hold that after the state has taken property without paying just compensation, judicial relief is proper and it is not necessary to exhaust administrative remedies. Indeed, such a requirement would be an exercise in futility. Dahl v. City of Palo Alto, 372 F.Supp. 647, Sneed v. County of Riverside, 218 Cal.App. 205. Of what possible use would it be to obtain a permit to build a house after the property has been taken by the state? Where does the money come from to pay for administrative, and eventually, judicial appeals, after a property owner has lost his property and is virtually in bankruptcy? The California Court of Appeal refused to discuss this argument even though it is undisputed that Petitioner's property was in fact taken before

its administrative remedies were exhausted.

CONCLUSION

It is time that land planning for conservation and preservation of the environment be put into perspective with regard to the Fifth and Fourteenth Amendments. As shown above in this petition, every basis of the California Court of Appeal decision is incompatible with the protection of Petitioner's property rights guaranteed by the United States Constitution.

The callous approach of the California courts to Petitioner's plight is demonstrated by these quotes from the trial court and the appellate court:

> "The fact that Plaintiff is financially unable to 'weather the storm' by meeting the cost of carrying its development during the interim period comtemplated by the act does not transform otherwise constitutional legislation into an unconstitutional taking of private property." (Appendix D, p. 4).

> "...it is apparent that the measure of damage occasioned by the application of conditions to a property owner's use of his property should not vary with the equity the property owner has in his land or his financial ability to forego its economic use for a time." (Appendix A, p. 62).

Surely those quotations evidence an elitist approach to constitutional rights. Petitioner, unfortunately, is not one of the privileged few who, because of virtually limitless wealth, could forego all economic use of their property for years at a time. The falacious reasoning of the trial court and the Court of Appeal was that Petitioner must endure its permanent property losses because others with greater financial resources might be able to forego the economic use of their property "for a [longer] time."

The writ should be granted so that this Court can decide these unanswered federal constitutional questions:

1. Can the state, merely for planning purposes, where neither a nuisance nor public health, safety or morals are involved, prevent the only use which can be made of real property without incurring liability for inverse condemnation?

2. Does due process of law require the state to provide a hearing before it takes, for planning purposes, the only use which a private property owner can make of his real property?

3. Does a property owner have to pursue futile administrative remedies after his property has been taken before he can sue for just compensation?

4. After real property has been subdivided, improved and sold pursuant to existing local, state and federal laws, can the electors at a later date initiate new laws which prevent the only use an owner can make of his property unless the

owner donates property to the public for public use?

5. Can the state, by legislative act, immunize itself from liability under the Fifth Amendment for taking property without paying just compensation?

Respectfully submitted,

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(APPENDIX A THROUGH E)

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APPENDIX A

IN THE

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT - DIVISION ONE

1 Civ. 39320
Sup.Ct. No. 71226

(NOV. 7, 1977)

FRISCO LAND AND MINING CO.,

Plaintiff and Appellant,

vs.

STATE OF CALIFORNIA,

Defendant and Respondent.

Plaintiff, the owner of a 650-acre subdivision, substantially all of which was embraced within the permit area of the coastal zone created by the California Coastal Zone Conservation Act of 1972 (Pub. Resources Code, ¶¶ 27000-27650, particularly ¶¶ 27100 and 27104), has appealed from an order granting the defendant State of California's motion for summary

judgment and the judgment entered thereon.[1] The plaintiff sought damages[2] in inverse condemnation claiming that his land was taken by the state through the acts and ommissions of the North Central Coast

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1. The order is nonappealable, but its correctness is reviewed on the appeal from the judgment. (See 6 Witkin, Cal. Procedure (2d ed.1971) Appeal, ¶ 59, pp. 4074-4075.)

2. Plaintiff claimed total damages of $3,935,800, consisting of the following:

126 single family lots in unit 5	$1,215,000
Multiple residential portion of unit 5	1,044,000
174 lots in unit 6	1,044,000
Multiple residential portion of unit 6	290,700
Interest paid on purchase price, note and deed of trust	21,000
Real estate taxes	70,000
Payments on assessment district bonds	85,000
Payments for water district improvements	3,500
Premium on performance bond	7,500
Advertising expense	12,000
Engineering and other expense	18,100
Improvements	125,000

Regional Commission, a regulatory body created by the provisions of the coastal act.

The thrust of the subdivider's argument below and on appeal is that the state, through the passage of the coastal act and the subsequent acts and omissions of the regional commission, deprived it of the only use it had for its lands, that is, the sale of lots for the building of single family homes, and thereby took its property without the payment of just compensation. The trial court concluded on the record before it that the passage of the coastal act, although it affected the marketability of all projects within the permit area, did not constitute inverse condemnation; that the regional commission recognized the subdivider's vested right to complete the improvements in one unit of the subdivision; that the subdivider

had no vested right to construct improvements on its lots; and that the conditions the regional commission proposed to and did impose on the construction of improvements on lands within the subdivider's holdings were reasonable and necessary to carry out the purposes of the coastal act. It also concluded that the subdivider was barred from seeking any relief because of a failure to exhaust its administrative remedies.[3]

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3. In earlier proceedings in the same case the court had overruled the state's demurrer to the subdivider's complaint. The facts established on the motion for summary judgment are substantially as alleged in the complaing. It claims that the court erred in failing to apply the same principles in ruling on the motion for summary judgment. The case is governed by Timm c. McCartney (1935) 9 Cal.App.2d 230, where in response to a similar contention the court stated: "It is a somewhat common occurrence for a trial court to change its rulings upon questions of law during the progress of a trial, and a ruling on demurrer occupies no better position in this regard than any other ruling from which an appeal cannot be taken. (De La Beckwith v.

An examination of the undisputed facts, the purposes and provisions of the coastal act, and the precedents construing it reflects that the conclusions of the trial judge were correct. The judgment must be affirmed. We first set out the status of the subdivider's property as it existed prior to November 8, 1972, the effective date of the coastal act, and then review the various acts and omissions which he contends constituted a taking of his property.

Background

In March 1971 the subdivider acquired the subdivision known as Oceana Marin located at Dillon Beach in Marin County.

3.(cont.) Superior Court, 146 Cal. 496.. ...)" (9 Cal.App.2d at p. 932. See also Vertex Inv. Co. v. Schwabacher (1943) 57 Cal.App.2d 406, 409; 1 Witkin, Cal. Procedure (2d ed.1970) Courts, ¶ 165, P. 435 and 3 id. (1971) Pleading, ¶ 836, p. 2443.)

The property included some unsold lots in units 3 and 4 and approximately 550 acres of undeveloped land. It was subject to an existing purchase money deed of trust in the principal sum of $330,000 which required payments of $60,000 per year on principal and interest. Tentative subdivision maps of units 5 and 6 covering the 550 acres of land had been approved by the Marin County Planning Commission on March 16, 1970.

The subdivider recorded the final subdivision map of unit 5 on March 3, 1972. The land was divided into 146 single family lots, and as a condition of recording the final map, the subdivider posted a $500,000 subdivision performance bond with the county to guaranty the installation of all subdivision improvements. Prior to the recording of the final map the subdivider applied for and secured permits from five agencies, and thereafter from three more.

An assessment district was formed for unit 5 and $660,000 was raised by the sale of special assessment bonds to pay a part of the costs of installing domestic water, sewage disposal and elecgrical systems in that unit of the subdivision. The principal and interest payments, which were a lien on the land, amounted to approximately $90,000 per year. The subdivider expended about $270,000 on subdivision improvements, and, at the time of the adoption of the coastal act, was committed to the expenditure of $200,000 more in order to complete streets within the unit.

The time for filing the final subdivision map for the contemplated 174 single family lots in unit 6 had been extended to August 1973. During 1972 the subdivider proceeded with engineering work preparatory to recording such a final map.

Admittedly the plaintiff was sub-

dividing the land in Oceana Marin for the purpose of selling lots to the public as residential building sites. It is not engaged in the business of building homes, had never constructed a house, and dit not intend to do so at Oceana Marin.

The sale of lots to the public in Oceana Marin commenced in June 1972, and by November 8, 1972, 20 lots in unit 5 had been sold, and several lot owners were planning to build homes on their newly acquired property in the following spring.

Period November 8, 1972 - March 1, 1973

The subdivider categorically states that on November 8, 1972, following the majority vote to adopt the coastal act, his lots immediately became unsaleable, and that no one knew whether the lots could be built on. It would be more accurate to state that all interested

were put on notice of the provisions of section 27400, which provided in pertinent part: "On or after February 1, 1973, any person wishing to perform any development within the permit area shall obtain a permit authorizing such development from the regional commission . . ." Such was the purport of an "Amended Final Subdivision Public Report" which the State Department of Real Estate issued on January 26, 1973, with respect to unit 5 of Oceana Marin.

The subdivider, with justification, does complain that since the regional commission was not even organized until February 1973 it was impossible to obtain clarification regarding the use it could make of its property, and that its letter of inquiry on January 15, 1973, to a newly appointed member of the regional commission went unacknowledged and unanswered until March 1, 1973. In San Diego Coast Regional

Com. v. See the Sea, Limited (1973) 9 Cal. 3d 888, the court ruled that the coastal act required a coastal permit for construction of their projects prior thereto. (9 Cal.3d at p. 890. See also Environmental Coalition of Orange County v. Avco Community Developers, Inc. (1974) 40 Cal. App.3d 513, 522-523.) The majority opinion recognized that financial hardship was caused by the coastal act, and attempted to minimize it as follows: "Had the act been intended to require a permit for completion of construction commenced before 1 February, the requirement would as a practical matter have resulted in a moratorium on all construction in the permit area. The built-in delays incident to the issuance of permits, which could exceed seven months (¶¶ 27420, 27423), would have necessitated work stoppages for all development along the California coastline

after 1 February 1973 for a significant period (except the rare uncompleted projects commenced prior to 1 April 1972). Such interference with construction in progress, tantamount to a moratorium, would result in serious economic dislocations not contemplated by the act, its authors, or the voters. (¶) Therefore, in the absence of language in the act imposing a moratorium, it is reasonable to conclude the voters intended none." (Id., p. 892, fn. omitted.)

Despite the ruling in the foregoing case, as property owner could only proceed at his peril in performing any development because the provisions of section 27404 only expressly exempted developments in which substantial work had been performed pursuant to a building permit, prior to April 1, 1972 (subsequently Stats. 1973, ch. 28, ¶ 1, effective April 18, 1972,

amended to Nov. 8, 1972) and the act provided severe civil penalties for its violation (¶¶ 27500 and 27501). It was subsequently held that an application for a claim for exemption as provided by the statewide coastal commission's rules was a necessary predicate to raising a vested right to an exemption in court. (South Coast Regional Com. v. Gordon (1977) 18 Cal.3d 832, 834 and 837, fn. 4, distinguishing San Diego Coast Regional Com. v. See the Sea, Limited, supra; and State of California v. Superior Court (Veta Company) (1974) 12 Cal.3d 237, 249-250; and Davis v. California Coastal Zone Conservation Com. (1976) 57 Cal.App.3d 700, 708.)

The subdivider is entitled to challenge the constitutionality of the coastal act on its face even though it failed to make such a challenge before the regional commission at the time it applied for an exemption,

or in its subsequent application for a permit. It cannot, however, challenge the constitutionality of the manner in which the provisions of the act were applied to him by the regional commission without having raised constitutional objections before that body. (State of California v. Superior Court (Veta Company), supra, 12 Cal.3d 237, 250-252.)

The question of the propriety of delaying any right to secure a permit for the period between November 1972 and February 1973, or the right to recover compensation for that delay, does not appear to have been expressly considered. Nevertheless, it is embraced within the principles that have sustained the validity of imposing a moratorium for a four year period to formulate a coastal plan, and that have denied the right of the property owner to recover damages for inverse condemnation.

In Avco Community Developers, Inc. v. South Coast Regional Com. (1976) 17 Cal.3d 785, the developer attacked the constitutionality of the act and alleged that he had been deprived of the value of his land. The court stated: "Our conclusion that no vested right inures to proceed with development of tract 7479 does not strip this land of all value. The result is merely that Avco, like all other landowners in the coastal zone who have not acquired a vested right to develop their property, must apply to the commission for a permit and, if the application is denied, then the desired buildings on the tract cannot be constructed during the period the Act is in effect. As we pointed out in State of California v. Superior Court (Veta), supra, 12 Cal.3d 237, 253, the Act is only an interim measure designed to assure that valuable coastal zone resources are not

irreversibly committed during the time the commission is developing a comprehensive plan for the orderly development of the coast, and the permit requirement will automatically be repealed 91 days after adjournment of the 1976 regular session of the Legislature." (17 Cal.3d at pp. 801-802. See also State of California v. Superior Court (Veta Company), supra, 12 Cal.3d 237, 253; and Davis v. California Coastal Zone Conservation Com., supra, 57 Cal.App.3d 700, 708.)

In the Veta Company case the court, with some skepticism, accepted the developer's pleading that its application for a permit was denied in order that its land would "remain undeveloped and devoted to, and held for, public use as open space land." (12 Cal.3d at pp. 352-353.) After examining the provisions of the coastal act, the court summarized, "Thus,

the requirement for a permit is an interim measure to assure that developments in the coastal zone are consistent with the objectives of the Act so that priceless coastal resources are not irreversibly committed to uses which would be inconsistent with the plan ultimately developed." (12 Cal.3d at p. 253.) The court then reviewed precedents upholding the validity of interim zoning ordinances and other measures to preserve the status quo pending adoption of a comprehensive zoning plan. It concluded: "In view of the foregoing authorities, denial of a building permit to Veta on the ground that the land it proposes to develop may ultimately be designated for public use in the coastal zone plan to be adopted by the Commission by December 1975, does not amount at this time to a taking of property for public use without compensation. The trial court therefore erred

in overruling the general demurrer to the sixth cause of action." (12 Cal.3d at p. 255. See also CEEED v. California Coastal Zone Conservation Com. (1974) 43 Cal.App.3d 306, 324-325; and Davis v. California Coastal Zone Conservation Com., supra, 57 Cal.App.3d 700, 708.)

In Sierra Club v. California Coastal Zone Conservation Com. (1976) 58 Cal.App.3d 149, in response to the contention that the public had a vested right that the California coastal zone would be preserved in the state as it existed at the time of the passage of the coastal act, the court stated: "But the act does not establish any present possessory interest of the people of the State of California in property lying within the coastal zone. Although such possessory interest may be established over at least part of the coastal zone as a result of the planning

function established by the act (see ¶¶ 27300 et.seq., 27320), the only actual control over the coastal zone which has been vested in the public by the Act has been by way of the permit-granting function of the regional and state Commissions within the coastal zone 'permit area.' (¶¶ 27104, 27400 et seq., 17420 et seq.) If the public's rights in the coastal zone were presently vested, the result would have constituted a taking of property from all landholders within the coastal zone. [Citations.] Appellant, as part of the public, has no vested right in the coastal zone." (58 Cal.App.3d at p. 155.)

The subdivider's argument that the coastal act was invalid because, as an initiative measure, it denied a right to a hearing before imposing restrictions on the use of land, has been often answered. (See Avco Community Developers, Inc. v.

South Coast Regional Com., supra, 17 Cal.3d 755, 800-801; San Diego Bldg. Contractors Assn. v. City Council (1974) 13 Cal.3d 295, 210-218; and CEEED v. California Coastal Zone Conservation Com., supra, 43 Cal.App.3d 306, 312-320.) The case last cited also refuted arguments that the coastal act was unconstitutional because it constituted an invalid state intrusion into municipal affairs of chartered cities, because it unlawfully delegates legislative power to the commission, because it fails to provide for procedural due process in permit applications, and because it infringes on the fundamental right to travel. (See 43 Cal.App.3d at pp. 320-324, 325-329, 329-330 and 330-333.)

The subdivider has failed to show he is entitled to any damages for losses incurred because of the moratorium placed on the development of inimproved lots during the

period from November 1972 to March 1973.

Application for and Action on Claim for Exemption

The state commission held its first meeting February 15, 1973. On March 1, 1973, forms were made available for property owners claiming an exemption from the provisions of the coastal act (see ¶ 27404). The subdivider applied to the regional commission for an exemption to allow completion of the improvements in unit 5, and to allow the construction of homes on any lot in units 3, 4 and 5 by any person. The subdivider alleged that its lots continued to be unsaleable, and it pointed out that it had no income with which to pay real property taxes, or meet assessment bond payments, or mortgage payments.

The application for exemption come on for hearing on May 3, 1973. At that time

the subdivider advised the regional commission that it had invested in excess of $750,000 in subdivision improvements, that the lots were completely unsaleable because prospective lot buyers did not know whether the commission would issue permits to build houses, and that it was still unable to meet its fixed payments. Although no application had been filed with respect to unit 6, the subdivider advised the regional commission that without the income from the sale of lots it could not complete the work and record the final subdivision map for unit 6, and that the tentative map of that unit could not be renewed by the County of Marin.[4]

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4. So far as appears from the record no application was ever made to exempt the development of unit 6 from the coastal act (¶ 27404), or to secure a permit for its development as provided in the act (¶¶ 27400-27403). In fact, the right to subdivide under the tentative map expired in August 1973 because the subdivider had no

On that date the regional commissioners found that the subdivider had a vested right to complete the subdivision of unit 5, and that the subdivision of units 1, 3 and 4 had been completed. It recognized and granted the claim of exemption from the coastal act for the development consisting of the completion of the subdivision of unit 5. The commission found that the erection of houses by individual purchasers on individual lots in all units would constitute separate developments within the meaning of the

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4.(cont.) funds to do the necessary engineering work for final approval. Any claim for the taking of that property is subject to all, if not more, of the infirmities attendant to the claim for the taking of the unsold lots in units 3, 4 and 5. Since no lots were available, it could in no event be said that the coastal act or the regional commissioner prevented the sale of that land by imposing improper conditions on the construction of single family dwellings. It was ostensibly marketable to anyone who wished to assume the additional development expense attendant to securing a permit under the coastal act.

coastal act. It found that the development of the lots by future erection of houses was not exempt from the permit provisions of the coastal act, and accordingly denied the claim of exemption. In so segregating the development and denying the claim of exemption for the erection of structures the regional commission was acting as authorized under the coastal act.

In Avco Community Developers, Inc. v. South Coast Regional Com., supra, 17 Cal.3d 785, the developer, as here, had filed a final subdivision map, approved by the county, for one tract of its larger holdings. The county had authorized the construction of 18,925 residential units on 27 parcels, devoted principally to multiple residential uses, according to "Planned Community District Regulations." The opinion states: "By February 1, 1973, pursuant to approvals issued for such pur-

poses by the county, Avco had completed or was in the process of constructing storm drains, culverts, street improvements, utilities, and similar facilities for the tract as well as for the remainder of the Capron property. Under the county's building code, a permit could not be obtained until grading had been completed. Avco had not completed the rough grading by February 1, 1973, and it neither submitted building plans for the tract nor obtained a permit to construct any structures. Before that date, the company had spent $2,082,070 and incurred liabilities of $740,468 for the development of the tract; it is losing $7,113.46 a day, largely due to loss of anticipated rental value, as a result of its inability to proceed with construction of buildings on the tract." (17 Cal.3d at pp. 789-790.)

The developer sought judicial review

after the regional and state commissions had denied it an exemption on its claim that it had a vested right to complete the development. The action of the trial court is reported as follows: "Although the court opined that fairness suggested Avco be allowed to complete development of the tract in accordance with the map, the regulations and the model, nevertheless because Avco did not have a building permit the trial court felt compelled to hold that it did not have a vested right to construct the buildings, and thus was not exempt from the permit requirement of the Act." (Id., p. 790.) The Supreme Court rejected the developer's contentions that it had a vested right to complete the proposed buildings under the common law or under the provisions of the act. It concluded, "If we were to accept the premise that the construction of subdivision

improvements or the zoning of the land for a planned community are sufficient to afford a developer a vested right to construct buildings on the land in accordance with the laws in effect at the time the improvements are made or the zoning enacted, there could be serious impairment of the government's right to control land use policy. In some cases the inevitable consequence would be to freeze zoning laws applicable to a subdivision or a planned unit development as of the time these events occurred." (Id., p. 797. See also Oceanic California, Inc. v. North Central Coast Regional Com. (1976) 63 Cal.App.3d 57, 67 and 69-70 and 76-77; supra, 58 Cal.App.3d 149, 157.)

In this case acknowledgedly no building permit had been issued to the subdivider or to the owner of any unimproved lot. It was admitted that construction on each lot would be a separate project. There was,

therefore, no right to an exemption. (See South Coast Regional Com. v. Higgins (1977) 68 Cal.App.3d 636, 644-645; and Oceanic California, Inc. v. North Central Coast Regional Com., supra, 63 Cal.App.3d 57, 77-80.)

Permit Proceedings

At the hearing on May 3, 1973, the regional commission followed the legal advice of the Attorney General in denying the exemption for the construction of homes by lot owners. The Attorney General also advised the commissioners that they could legally grant the subdivider a "blanket permit" which would allow the construction of a house on any lot in units 3, 4 or 5 by any person. On June 18, 1973, the subdivider at the suggestion of the regional commission, applied for a permit to cover the construction of single family homes on 180 lots in units 3, 4 and 5.

At a meeting on July 5, 1973, the regional commission discussed in general its power to condition blanket permits,[5] but it expressed no intention of imposing any new conditions on the subdivider's subdivision as a condition of allowing third

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5. Section 27402 provides: "No permit shall be issued unless the regional commission has first found, both of the following: [¶] (a) That the development will not have any substantial adverse environmental or ecological effect. [¶] (b) That the development is consistent with the findings and declarations set forth in Section 27001 and with the objectives set forth in Section 27302. [¶] The applicant shall have the burden of proof on all issues."

Section 27001 states: "The people of the State of California hereby find and declare that the California coastal zone is a distinct and valuable natural resource belonging to all the people and existing as a delicately balanced ecosystem; that the permanent protection of the remaining natural and scenic resources of the coastal zone is a paramount concern to present and future residents of the state and nation; that in order to promote the public safety, health, and welfare, and to protect public and private property, wildlife, marine fisheries, and other ocean resources, and the natural environment, it is necessary

5. (cont.) to preserve the ecological balance of the coastal zone and prevent its further deterioration and destruction; that it is the policy of the state to preserve, protect, and, where possible, to restore the resources of the coastal zone for the enjoyment of the current and succeeding generations; and that to protect the coastal zone it is necessary: [¶] (a) To study the coastal zone to determine the ecological planning principles and assumptions needed to ensure conservation of coastal zone resources. [¶] (b) To prepare, based upon such study and in full consultation with all affected governmental agencies, private interests, and the general public, a comprehensive, coordinated, enforceable plan for the orderly, long-range conservation and management of the natural resources of the coastal zone, to be known as the California Coastal Zone Conservation Plan. [¶] (c) To ensure that any development which occurs in the permit area during the study and planning period will be consistent with the objectives of this division. [¶] (d) To create the California Coastal Zone Conservation Commission, and six regional coastal zone conservation commissions, to implement the provisions of this division."

Section 27302 reads: "The coastal zone plan shall be consistent with all of the following objectives: [¶] (a) The maintenance, restoration, and enhancement of the overall quality of the coastal zone environment, including, but not limited to, its amenities and aesthetic values. [¶] (b) The continued existence of optimum populations of all species of living organisms. [¶] (c) The orderly, balanced utilization and preservation, consistent with sound con-

party lot owners to build on their lots. A study by the staff of the regional commission revealed that there were substantial geological problems affecting the subdivision, including active landslide areas, expanding/swelling soils, high water table, bluff erosion/recession and proximity to

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5. (cont.) servation principles, of all living and nonliving coastal zone resources. [¶] (d) Avoidance of irreversible and irretrievable commitments of coastal zone resources."

Section 27403 requires, "All permits shall be subject to reasonable terms and conditions in order to ensure: [¶] (a) Access to publicly owned or used beaches, recreation areas, and natural reserves is increased to the maximum extent possible by appropriate dedication. [¶] (b) Adequate and properly located public recreation areas and wildlife preserves are reserved. [¶] (c) Provisions are made for solid and liquied waste treatment, disposition, and management which will minimize adverse effects upon coastal zone resources. [¶] (d) Alterations to existing land forms and vegetation, and construction of structures shall cause minimum adverse effect to scenic resources and minimum danger of floods, landslides, erosion, siltation, or failure in the event of earthquake."

the San Andreas fault. The staff also noted that there was a need for strict architectural controls for aesthetic as well as safety reasons; a need for adequate access to and signposting for public beach areas; and a need to provide for and designate responsibility for the maintenance of the common or open areas within the subdivision.

On July 18, 1973, without any prior consultation with the subdivider, the staff rendered a report recommending 13 conditions to be imposed as a condition to the issuance of a blanket permit for home construction in units 3, 4 and 5. They generally provided for the composition of and the criteria to be followed by a "Design Review Committee"; for the control of erosion; for access to and signposting of access to, the beach; and for the maintenance of common lands. The subdivider

objected to the conditions because it claimed they would render its lots still more unsaleable. It particularly objected to the following provision: "That the homeowners' association agree to repair damage in the common areas due to landslides, soil creep, sloughing, slumping, gullying, or erosion. This repair shall be undertaken on no less than on an annual basis." According to the subdivider this would make the lot owners responsible for the cost of stabilizing the California coast line. It also refused to accede to a condition that the staff of the regional commission have in effect a veto over approval by the "Design Review Committee."

In 1970 the subdivider's predecessor in interest had dedicated to the County of Marin four beach access easements extending from streets in unit 1, and other easements insuring public access to the Pacific Ocean

Nevertheless, in August at the first public hearing on the application for a blanket permit, the regional commission indicated its desire to require the subdivider to dedicate an additional easement for a right-of-way for public access along a one and one-third mile stretch of ocean front along the bluffs overlooking the ocean at Oceana Marin. At that meeting the subdivider complained that only six lots had been sold since November 8, 1972.

At a second public meeting on September 6, 1973, the regional commission indicated that the unlimited liability of lot owners under the clause quoted above and the dedication last referred to were absolute requirements for a granting of a blanket permit. The subdivider advised the commission that the two conditions were unacceptable, that they created insurmountable problems which would con-

tinue to makes its lots unsaleable, and that it would not accept a permit on such conditions. The minutes, however, indicate that the easement along the bluff was negotiable. The matter was continued to September 10. On September 17, the subdivider formally withdrew its application for a blanket permit on the advice of its real estate brokers that the conditions would hurt rather than help the property.[6]

Despite the withdrawal of the subdivider's application the regional commission on September 20, 1973, on its own initiative, adopted eight conditions to be applied to any permit for development by construction of a home at Oceana Marin.

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6. According to the subdivider, at that point in time it was in arrears on principal and interest payments on the promissory note secured by the deed of trust on its land, and the note holders were threatening foreclosure; it was in arrears in principal and interest payments due on assessment district bonds, and the bondholders were filing foreclolsure notices; it was in arrears in the payment of its real property taxes; and there remained to be constructed and paid for in excess of $175,000 street improvements in unit 5.

These conditions referred to the design committee already created by deed restrictions applicable to the subdivision. They made it clear that the Executive Director of the North Central Coast Regional Commission had no authority to reject approval of plans and specifications which complied with the permit. The liability of lot owners for maintenance of the common areas was limited to an aggregate maximum of $5,000 per year. One condition did appear to refer to dedication of the easement to which the subdivider had objected.[7]

Thereafter a lot owner in unit 3 applied for a permit and because his lot was considered an integral part of the subdivision he was on November 1, 1973, denied a permit because the conditions recommended for resolution of the specific problems in the overall development had not been met or

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7. Footnote next page.

satisfied. In November the subdivider was advised that the Attorney General had ruled that the regional commission was without jurisdiction to issue a "blanket permit." The commission on November 7, 1973, did send out a notice to all property owners concerning the necessity for cooperative action between the developer and the individual lot owners, preferably acting

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7. The subdivider, who then was no longer before the regional commission, contends that he could not have dedicated the requested easement, because part of it was in unit 4, and the lots had been sold in that unit on the basis that a portion of the easement requested by the commision for a public trail had been designated as a private road, and because the remainder of the easement in unit 4 was across two lots in which the subdivider had no interest. The rest of the requested easement apparently lay in proposed unit 6 which was encumbered by a deed of trust. The subdivider contends the concurrence of the beneficiaries under the deed of trust would have been necessary. The minutes of the meeting of September 6, 1973, however, report the subdivider as stating he had conceded the bluff-top access.

through their homeowner's association, in order to fulfill the criteria established in the conditions adopted September 20, 1973.

On December 21, 1973, the subdivider presented a claim for $3,935,800 to the State Board of Control. It was denied on January 15, 1974, and this action was filed May 10, 1974.

Meanwhile the lot owner from unit 3, on January 21, 1974, reapplied for a permit. As a result of discussions with lot owners and the homeowners' association, ten modified conditions were promulgated on March 21, 1974,[8] and on that date the lot owner secured

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8. These conditions spelled out in detail the responsibilities of the property owners' association, and limited the liability of any lot for the maintenance of the common lands to $30 per year. They limited the responsibility of the lot owners for the requested easement to so much as traversed common lands, but they gave notice that the development of further lands would entail an additional dedication by the subdivider.

a permit subject to approval of the overall conditions by the homeowners association. A second lot owner from unit 5 applied for a permit on March 26, 1974. On May 9, 1974 his permit was approved, but construction under the permit was stayed until the regional commission found that satisfactory progress had been made toward the initiation or accomplishment of the overall conditions for Oceana Marin adopted in March 1974. The lot owner sought judicial review and the trial court upheld the conditions in an intended decision filed January 3, 1975.

The parties have not argued the validity of the conditions imposed by the regional commission in detail. It is established that a regulatory body may require a dedication of property in the interests of the general welfare as a condition of permitting the subdivision of lands. In Associated

Home Builders etc., Inc. v. City of Walnut Creek (1971) 4 Cal.3d 633, the court upheld the provisions of section 11546 of the Business and Professions Code that authorize the governing body of a city or county to require that a subdivider must, as a condition to the approval of a subdivision map, dedicate land or pay fees in lieu thereof for park or recreational purposes. The court relied upon Ayres v. City Council of Los Angeles (1949) 34 Cal.2d 31, which had upheld a requirement of a dedication of land for a thoroughfare abutting on the subdivision. In the later case the court analyzed the earlier case as follows: "We held that the city was not acting in eminent domain but, rather, that a subdivider who was seeking to acquire the advantages of subdivision had the duty to comply with reasonable conditions for dedication so as to conform to the welfare of the lot owners

and the general public. We held, further, that the conditions were not improper because their fulfillment would incidentally benefit the city as a whole or because future as well as immediate needs were taken into consideration and that potential as well as present population factors affecting the neighborhood could be considered in formulating the conditions imposed upon the subdivider. We do not find in Ayres support for the principle urged by Associated that a dedication requirement may be upheld only if the particular subdivision creates the need for dedication." 4 Cal.3d at p. 638.)

So here the subdivider was in effect caught in a rezoning which although, cast as a moratorium, was designed to permit development which was consistent with the plan to be devised. It was proper to condition the development permits on the

dedication of easements for the general welfare, particularly for access to the public beaches along the coast. Moreover, it was consistent with the welfare of the public and those who would live within the subdivision to provide for maintaining the common areas. To state the contrary is to demonstrate the validity of the condition. Is there a vested right to divide and sell land leaving unbuildable areas free to erode away to the future detriment of the public and those within the subdivision? The answer is obvious, and the commission acted properly in the premises. If the first conditions were too onerous on prospective lot owners, and the foregoing conclusions are erroneous, the subdivider and the lot owners, of which it was the principal owner in unit 5, had their rights to administrative and judicial review.

Failure to Exhaust
Administrative Remedies

The subdivider by withdrawing his application for a blanket permit, placed itself in the position of one who has failed to exhaust his administrative remedies. He not only failed to continue to assert his contentions to the initial hearing body, but he abandoned the right he had to seek review by the state commission (¶ 27423), and judicial review of its decision if still dissatisfied. (¶ 27424; and see Code Civ. Proc., ¶ 1094.5

The cases referred to above have established that the objector must exhaust his administrative remedies before seeking judicial review of a regional commission's action on an application for an exemption. (South Coast Regional Com. v. Gordon, supra, 18 Cal.3d 832, 834; and State of California v. Superior Court (Veta Company), supra, 12 Cal.3d 237, 250-252.) There is no

reason the same rule should not apply to review of the denial of a permit, or review of the grant of a permit on conditions which the permittee contends are invalid or unwarranted. "This is the doctrine of 'exhaustion of administrative remedies.' In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the court will act." (Abelleira v. District Court of Appeal (1941) 17 Cal.2d 280, 292. See also Metcalf v. County of Los Angeles (1944) 24 Cal.2d 267, 269-273; Davis v. California Coastal Zone Conservation Com., supra, 57 Cal.App.3d 700, 704-705; Igna v. City of Baldwin Park (1970) 9 Cal.App,3d 909, 914; Smith v. City of Duarte (1964) 228 Cal.App.2d 267, 269-270; and Dunham v. City of Westminster (1962) 202 Cal.App.2d 245, 248-250.) In Igna v. City of Baldwin

Park, supra, the zoning ordinance provided that the offended landowner could apply for a permit to continue the nonconforming use of her land. She declined to do so and filed an action to compel the issuance of certain permits by way of mandamus, and sought injunctive and declaratory relief, and damages by way of inverse condemnation. The court affirmed a judgment entered after a demurrer had been sustained without leave to amend, because it appeared she had failed to exhaust her administrative remedies.

The subdivider claims he was not required to exhaust his administrative remedies between November 1972 and March 1973 because there was no commission in existence. (See Eye Dog Foundation v. State Board of Guide Dogs for the Blind (1967) 67 Cal.2d 536, 543-544; and Bernstein v. Smutz (1947) 83 Cal.App.2d 108, 114-115.) While it may

be true that there was no adminstrative body during that period, it was clear from the terms of the coastal act that one would be in existence. The cases which have been reviewed above indicate that any interim moratorium on development was not actionable.

Once the commission was appointed the subdivider had an opportunity for a full hearing, not only on its claim for exemption by virtue of vested rights, but also for a permit for the development of the lots it owned. Fuentes v. Shevin (1972) 407 U.S. 67, and related cases which require a hearing before a person is deprived of any significant property interest, are not in point. The constitutionality of the coastal act has been sustained, because as an initiative ordinance, the original interference with the property rights of landowners was legislative not judicial. (See Avco Community Developers, Inc. v.

South Coast Regional Com., supra, 17 Cal.3d 785, 800-801; and San Diego Bldg. Contractors Assn. v. City Council, supra, 13 Cal.3d 205, 210-218. See also CEEED v. California Coastal Zone Conservation Com., supra, 43 Cal.App.3d 306, 312-320.) The case last cited also established that there was no "due process" violation by the act itself, or by the procedures established for hearing permit applications (43 Cal. App.3d at pp. 325-330).

The subdivider implies also that he could not assert any rights before the administrative tribunal because the Attorney General ultimately indicated that the commission could not issue "blanket permits." Sections 27423 and 27424 dealing with appeals and review require that any person be "aggrieved." In Klitgaard & Jones, Inc. v. San Diego Coast Regional Com., (1975) 48 Cal.App.3d 99, the court under-

took to define the term and concluded: "We are not prepared to ignore the word "aggrieved' so as to make it surplusage; nor will we give it so narrow an interpretation as to do harm to the purpose of the Act. With these factors in mind, we have determined that to be 'aggrieved,' a 'person' must, at the time of the hearing, be either (1) a resident of California, (2) a citizen of California, or (3) have a pecuniary or proprietary interest in the outcome of a permit hearing. Such a construction accommodates the need for a broad standing rule, while doing no violence to the express statutory language." (48 Cal.App.3d at p. 110.) It is clear that at all times the subdivider, not only as a seller of lots, but as the owner of a substantial number of lots, had both a pecuniary or proprietary interest in the outcome of the hearings at which the con ditions were approved, whether they be call

"blanket permits," or criteria or conditions for the issuance of permits for the development of lots in units 3, 4 and 5 by the construction of single family homes.

Finally, the subdivider relies on the doctrine that the exhaustion of administrative remedies does not apply "when the aggrieved party can positively state what the administrative agency's decision in his particular case would be. [Citations.]" (Ogo Associates v. City of Torrance (1974) 37 Cal.App.3d 830, 834. See also Eldridge v. City of Palo Alto (1976) 57 Cal.App.3d 613, 632-633; and Sneed v. County of Riverside (1963) 218 Cal.App.2d 205, 212.) The rationale of the foregoing cases is explained in Ogo Associates v. City of Torrance, as follows: "The evidence is overwhelming that the city council rezoned the Victor Precinct area because appellants planned to build their project there; it is inconceivable

the city council would grant a variance for the very project whose prospective existence brought about the enactment of rezoning. This is not a situation where the possibility of relief from a general policy exists because of the unusual circumstances of a particular case; to the contrary, in this instance the circumstances of the particular case gave birth to the ordinance's general policy. To require appellants to apply to the city council for a variance on behalf of this project would be to require them to pump oil from a dry hole." (37 Cal.App.3d at p. 834.) Similarly in Eldridge v. City of Palo Alto, supra, the majority of the court pointed out that the proposed development would be completely contrary to the goal of preserving the land in its natural or near natural state, so it was not necessary to apply for rezoning or a variance. In Sneed, the public

had already invaded the landowner's airspace, and the court recognized "a distinction between the commonly accepted and traditional height restriction zoning regulations of buildings and zoning of airport approaches in that the latter contemplates actual use of the airspace zoned, by aircraft, whereas in the building cases there is no invasion or trespass to the area above the restricted zone." (218 Cal.App.2d at p. 209.)

In this case insofar as there was an intent to keep any land in its natural or near natural state it was only for a temporary period, which, as we have seen, has been authorized by the courts. In fact, however, the coastal commission consistently recognized the right of lot owners, including the subdivider itself, to build homes on the lots in the subdivision, provided that they complied with conditions reason-

ably related to preserving attributes of the property which the electorate had deemed of importance. There was no reason why the subdivider could not have tested the validity of those conditions through the administrative and judicial proceedings provided by law. We cannot assume that any invalid conditions would have been approved after such review.[9]

Inverse Condemnation

In the ruling on the demurrer (see fn. 3 above), the court relied on Klopping v. City of Whittier (1972) 8 Cal.3d 39 and Bydlon v. United States (Ct. Cl. 1959) 175 F. Supp. 891. The former case concluded:

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9. We refrain from taking judicial notice, as requested by the state, that permits have been issued on 17 lots in units 3, 4 and 5, because such data was not before the trial court. The record itself, however, reflects that the commission had consistently modified its stand in order to find an accommodation between the views of the lot owners and the obligation of the commissioners to protect the environment during the moratorium period.

"[W]e hold that a condemnee must be provided with an opportunity to demonstrate that (1) the public authority acted improperly either by unreasonably delaying eminent domain action following an announcement of intent to condemn or by other unreasonable conduct prior to condemnation; and (2) as a result of such action the property in question suffered a diminution in market value." (8 Cal.3d at p. 52.) Since the state has never taken any action to condemn the subdivider's property, the case does not appear pertinent. (See Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal.3d 110,119.) In Bydlon the Court of Claims upheld an award of compensation because two resort owners, who had purchased from the government, had a way of necessity which was destroyed by a government regulation prohibiting flights below 4,000 feet over the wilderness area. Significantly no compensation was paid to two other resort owners

who suffered a dimunition in the value of their resort properties because they had other access. The damages were not, as claimed here, the value of the property, but the dimunition in the value of the property by the loss of the easement of necessity. (See 175 F.Supp. at pp. 891 and 916.)

Here the subdivider is not attempting to secure damages because of the imposition of a restrictive covenant concerning the maintenance of common lands, or the value of the requested easement along the ocean bluffs. Neither of those threatened "takings" which, as we have seen, are well within the regulatory power of government, entrenches physically upon the lots which it wishes to sell. In Selby Realty Co. v. City of Buenaventura, supra, 10 Cal.3d 110, the court, in concluding that there was no taking by the adoption of a general plan

which indicated dedication of a street might be required in the future, stated: "The adoption of a general plan is several leagues short of a firm declaration of an intention to condemn property. It is too clearly established to require extensive citation of authority that under certain circumstances a governmental body may require the dedication of property as a condition for its development (see e.g., Associated Home Builders etc., Inc. v. City of Walnut Creek (1971) 4 Cal.3d 633, 639 et seq. ..; Ayres v. City Council of City of Los Angeles (1949) 34 Cal.2d 31, 41-42 ...) and it may not be necessary for the county to acquire the land by eminent domain even if it is ultimately used for a public purpose. In order to state a cause of action for inverse condemnation, there must be an invasion or an appropriation of some valuable property right which the landowner possesses and the

invasion or appropriation must directly and specially effect the landownder to his injury. [Citation.]" 10 Cal.3d at pp. 119-120. See also HFH, Ltd. v. Superior Court (1975) 15 Cal.3d 508, 513-518[cert.den. (1976) 425 U.S. 904]; and Trust of Three v. City of Emeryville (N.D.Cal. 1977) 430 F.Supp. 833, 839-841.)

In Goldblatt v. Hempstead (1962) 369 U.S. 590, which is cited by the subdivider, the court folowed Mugler v. Kansas (1887) 123 U.S. 623, where it had recognized, "The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not -- and, consisistently with the existence and safety of organized society, cannot be -- burdened with the condition that the State must compensate such individual owners for pecuniary losses they may sustain, by reason

of their not being permitted, by a noxious use of their property, to inflict injury upon the community." (123 U.S. at p. 669, as quoted 369 U.S. 593.) The Goldblatt court continued, "This is not to say, however, that governmental action in the form of regulation cannot be so onerous as to constitute a taking which constitutionally requires compensation. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922); see United States v. Central Eureka Mining Co., [(1958) 357 U.S. 155] supra. There is no set formula to determine where regulation ends and taking begins. Although a comparison of values before and after is relevant, see Pennsylvania Coal Co. v. Maho, supra, it is by no means conclusive, ... How far regulation may go before it becomes a taking we need not now decide, for there is no evidence in the present record which even remotely suggests that

prohibition of further mining will reduce the value of the lot in question. Indulging in the usual presumption of constitutionality, ... we find no indication that the prohibitory effect of Ordinance No. 16 is sufficient to render it an unconstitutional taking if it is otherwise a valid police regulation." (369 U.S. at p. 594.) The subdivider can find no solace in that case. It upheld an injunction against violation of a regulation prohibiting excavating in what was the landowner's submerged quarry.

The subdivider relies upon a series of cases in which a governmental agency has undertaken inequitable zoning action as a prelude to, or in lieu of, public acquisition. (See Eldridge v. City of Palo Alto, supra, 57 Cal.App.3d 613, 626-629; Peacock v. County of Sacramento (1969) 271 Cal.App.2d 845, 856-863; Sneed v. County of Riverside,

supra, 218 Cal.App.2d 205, 209; Arastra Limited Partnership v. City of Palo Alto (N.D.Cal. 1975) 401 F.Supp. 962, 976-982 [vacated, set aside, and expunged (1976) 417 F.Supp. 1125]; Dahl v. City of Palo Alto (N.D.Cal. 1974) 372 F.Supp. 647, 648-649. Note, Drakes Bay Land Company v. United States (Ct.Cl. 1970) 424 .2d 574, 584-586; and Code Civ. Proc., ¶1245.260 and former ¶1243.1, added Stats. 1971, ch. 1681, ¶ 1, p. 3607, repealed Stats. 1975, ch. 1275, ¶ 1, p. 3409, operative July 1, 1976.) These cases all involve a situation where the public agency is seeking to condemn the property involved. Here there is only the imposition of new restrictions, and no threat of condemnation.

In U.S. v. 3.66 Acres of Land (N.D.Cal. 1977) 426 F.Supp. 533, Arastra, Bydlon and the Drakes Bay case were all distinguished. (426 F.Supp. at p. 535, fn. 2, and p. 536.)

Klopping, Peacock and Sneed were all distinguished in HFH, Ltd. v. Superior Court, supra, (15 Cal.3d at pp. 516 and 617, fn. 11). That case established that a zoning action which merely decreases the market value of property does not violate the constitutional provisions forbidding uncompensated taking or damaging. It upheld an order sustaining a demurrer to a cause of action seeking damages for inverse condemnation (15 Cal.3d at p. 518). We have seen that the adoption of the act itself gave no right to compensation. The conditions attached to the permit in this case cannot be treated as more serious than a change in zoning, and so no action is maintainable here on that score.

Since the commission is authorized to determine whether a permit should issue for a development after February 1, 1973, its actions are subject to judicial review

under section 1094.5 of the Code of Civil Procedure. The act expressly so provides (¶ 27424). Nevertheless, one who is improperly denied a permit may not recover damages. The state and the commissioners are granted immunity by sections 818.4 and 821.2 of the Government Code, which provide that neither a public entity nor a public employee is liable for injury caused by the refusal to issue a permit if the entity or employee is authorized to determine whether the permit should be issued. (State of California v. Superior Court (Veta Company), supra, 12 Cal.3d 237, 244-247.)

The court properly granted the summary judgment. The subdivider's principal complaint is that it was underfinanced and overburdened with debt so that it could not, as stated by the trial judge, "weather the storm." In Klopping, the plaintiff Sarff, in a companion case, lost his property by

foreclosure after he filed suit, as did the plaintiff here.[10] The court noted, "In the petition for hearing filed herein, it also appears that he seeks recovery for damages occasioned by the fact that his property was ultimately foreclosed because the condemnation resolution prevented him from deriving income from his land in order to make mortgage payments. The availability of this element of damage can be more fully explored on remand." (8 Cal.3d at p. 58.)

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10. The record shows that on June 21, 1974, after the complaint was filed in this action, the trustee under a deed of trust encumbering a part of the subdivider's property, exhausted the power of sale under the deed of trust and sold the property at auction. The subdivider claims the loss of the proposed lots in unit 6 in the sum of $1,334,700, and 32 single family lots in unit 5 in the sum of $600,000. On August 29, 1975, a declaration in opposition to the motion for summary judgment alleges that pending proceedings to foreclose the lien of the special assessment bonds has occasioned the loss of the $800,000 value of 47 lots, because the subdivider is unable to pay the $300,000 necessary to redeem. See also footnotes 4 and 6.

There the loss of income was from threat of condemnation and he was adjudged entitled to compensation for that loss. Here the loss of income was not occasioned by a threat of taking the subdivider's lots, but by public uncertainty as to the terms on which development would be permitted throughout the whole coastal area. We have held that such uncertainty was properly resolved, and that the subdivider is barred from complaining about the conditions under which it was resolved by failure to pursue his administrative remedies. Were we to find otherwise, and face the question posed in Klopping, it is apparent that the measure of damages occasioned by the application of conditions to a property owner's use of his property should not vary with the equity the property owner has in his land or his financial ability to forego its economic use for a time.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION

Sims, Acting P.J.

WE CONCUR:

Elkington, J.

Lazarus, J.*

*Retired superior court judge sitting under assignment by the chairman of the Judicial Council.

APPENDIX B

Order Due
January 6, 1978

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

1st District, Division 1

Civ. No. 39320

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

IN BANK

FRISCO LAND AND MINING COMPANY

v.

STATE OF CALIFORNIA

Appellant's petition

for hearing DENIED.

BIRD
Chief Justice

(FILED JAN. 4, 1978)

APPENDIX C

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MARIN
(JANUARY 16, 1976)

FRISCO LAND AND MINING CO., Plaintiff, v. STATE OF CALIFORNIA, et al. Defendant.	NO. 71226 ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND SUMMARY JUDGMENT

Defendant's motion for summary judgment in this case come on regularly for hearing before this Court on Thursday, September 25, 1975. William Fleckles appeared as counsel for plaintiff Frisco Land & Mining Co., and Daniel J. Taaffe appeared as counsel for defendant State of California. Having examined the pleadings on file in this case as well as the declarations and memoranda submitted by

counsel for and against a motion for summary judgment and having heard oral argument and good cause appearing;

IT IS ORDERED that defendant's motion for summary judgment is hereby granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that complaint herein be dismissed and that judgment be entered for defendant.

DATED: _____, 1976.

JOSEPH G. WILSON
JUDGE OF THE SUPERIOR COURT

APPENDIX D

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MARIN

FRISCO LAND AND MINING CO.,	)	
	)	
Plaintiffs,	)	NO. 71226
	)	
vs.	)	MEMORANDUM
	)	AND
STATE OF CALIFORNIA, et al.,	)	MINUTE
	)	ORDER
Defendants.	)	
	)	(DEC. 30, 1975)

I have reviewed the rather extensive Memoranda submitted in this case and have concluded that the State's motion for Summary Judgment should be granted. I do not intend to comment on all of the contentions raised by the parties, but I do feel that I should set forth a brief statement of the principal reasons for this determination.

The basic problem with Plaintiff's case is that Plaintiff misconceives the

nature and extent of its vested rights. It had a vested right to complete Unit 5, which has been recognized by the Commission. It did not have a vested right to build single family homes on the already subdivided lots in the other units, and neither did anyone else.

It did, and does, have the right to sell the subdivided lots which it owns and, it is certainly true, as the Attorney General concedes, that the passage of the Coastal Commission initiative and subsequent actions of the Commission pursuant thereto have adversely affected Plaintiff's ability to dispose of its finished lots. However, it is clear that the passage of the initiative, which itself undoubtedly affected the marketability of these properties, does not constitute inverse condemnation. (State of California vs.

Superior Court (Veta), 12 Cal.3d 237).

In its Complaint, Plaintiff alleges that the Commission imposed unreasonable conditions on third-party applicants for permits and sought thereby to compel Plaintiff to accept conditions with respect to its own land which the Commission could not properly impose on Plaintiff. In ruling on the Demurrer, I felt that these allegations sufficiently raised an issue which could not be resolved on the basis of the pleadings. However, the uncontradicted facts disclosed by the Motion for Summary Judgment simply do not bear out this contention. In acting on individual applications for permits from individuals who had purchased lots from Plaintiff, the Commission imposed conditions which were determined to be, and are in fact, reasonable and necessary to carry out its purposes under the act.

It is true that Plaintiff's vested right to sell its subdivided lots has been largely lost, because Plaintiff has been unable to meet the carrying charges involved and foreclosure proceedings have either been completed or pending against its remaining land. It is also true that Plaintiff's problems in this regard have, in large part, stemmed from the passing of the Coastal initiative and the consequent partial moratorium on development in this area. However, the principal basis for the holding in Veta, that the passage of the initiative did not constitute inverse condemnation was that it was essentially an interim measure. The fact that Plaintiff is financially unable to "weather the storm" by meeting the cost of carrying its development during the interim period contemplated by the act does not transform otherwise constitutional legislation into

an unconstitutional taking of private property.

I also feel that the State's contention that plaintiff has failed to exhaust its administrative remedies is well taken. My initial reaction to this was that the only administrative relief Plaintiff had to seek was to file a claim. However, this would be true only if the passage of the act itself constituted inverse condemnation, which it does not.

The actions of the Commission in implementing the Act, of which Plaintiff complains, were in my view reasonable and necessary to carry out its purposes. With respect to these actions, Plaintiff did have the right to seek administrative relief, as the Attorney General points out and the failure to do so is an additional reason why the Motion should be granted.

Accordingly, IT IS ORDERED that the Motion of the Defendant State of California for summary judgment be GRANTED.

DATED:

JOSEPH G. WILSON

JOSEPH G. WILSON
Judge of the Superior Court

APPENDIX E

IN THE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MARIN

--o0o--

FRISCO LAND & MINING COMPANY, Plaintiff, vs. STATE OF CALIFORNIA, et al., Defendants.	MEMORANDUM AND MINUTE ORDER NO. 71226 (OCT. 9, 1974)

Plaintiff seeks to assert a cause of action for inverse condemnation against the State of California based on action taken by The California Coastal Zone Commission and its staff. Plaintiff's complaint alleges a series of actions covering the period from early 1973 to the filing of the complaint. It is not clear to me why Plaintiff has chosen to set forth four

separate counts, but it is not significant for the purposes of this demurrer, since the essential thrust of Plaintiff's action is its contention that the entire course of conduct on the part of the Commission and its staff gives rise to its claim for inverse condemnation.

In attacking Plaintiff's complaint by demurrer, the State relies primarily on the recent Supreme Court case of State of California versus Superior Court (VETA), 12 Cal. 3rd 237. In that case, the Supreme Court held that the denial of a permit by the Commission did not constitute compensable taking or damaging of the property for which the permit was applied. However, Plaintiff has alleged more than the denial of its own application. It contends that the Commission is engaged in a program of denying permits to third party applicants, or imposing improper conditions upon them,

for the purpose of compelling Plaintiff to conform to certain acts and meet certain conditions with respect to its own property, which the Commission could not impose directly on Plaintiffs.

The third party applicants are persons who have purchased individual lots in Plaintiff's completed subdivision and who need permits to construct buildings upon them. According to Plaintiff, in acting on these permits in the fashion described, the Commission is endeavoring to compel Plaintiff to dedicate property and to assume obligations with respect to its subdivisions, which have been approved and are exempt from the requirements of the Coastal Zone Conservation Act. Such action on the part of the Commission has completely frustrated the sale of Plaintiff's remaining property and the orderly development of its lands, and has thereby

damaged Plaintiff's property to the extent alleged.

For the purpose of the demurrer, Plaintiff's allegations as to the action of the Commission and the purpose sought to be accomplished by such action must be taken as true. I cannot say that, as a matter of law, such action does not constitute a compensable taking or damaging. The action complained of is significantly different from the outright denial of a permit sought by the affected property owner as was the case in VETA. The case of Bydlon versus U.S., 175 Fed.Supp. 891, seems to me to be analogous. In Klopping versus Whittier, 8 Cal. 3rd 39, although the facts are not similar, the Supreme Court took the position that under the circumstances of that case Plaintiff was entitled to an opportunity to prove that the public authority engaged in unreasonable conduct and that such conduct diminished the value of

Plaintiff's property. I feel this same proposition applies to the facts of this case as alleged in Plaintiff's complaint.

The State also argues that Plaintiff has not exhausted its administrative remedies. However, as Plaintiff point out, as far as Commission action towards third parties is concerned, Plaintiff had no administrative remedies to exhaust. If Plaintiff can in fact establish its cause of action for inverse condemnation, then the only administrative procedure it would have been required to tollow was a file a claim, which has been done.

Accordingly, it is ordered that the demurrer of the State of California be overruled with 30 days to answer.

DATED: October 9, 1974.

JOSEPH G. WILSON
JUDGE OF THE SUPERIOR COURT

Supreme Court, U. S.
FILED
APR 28 1978
MICHAEL RODAK, JR., CLE

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1386

FRISCO LAND AND MINING CO., a corporation,
Petitioner,

v.

STATE OF CALIFORNIA,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First District, Division One, After Entry of Order by the Supreme Court of the State of California Denying a Hearing

Brief for Respondent in Opposition

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In the Supreme Court of the United States

October Term, 1977

No. 77-1386

Frisco Land and Mining Co., a corporation,
Petitioner,

v.

State of California,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First District, Division One, After Entry of Order by the Supreme Court of the State of California Denying a Hearing

Brief for Respondent in Opposition

OPINIONS BELOW

The unreported memorandum and minute order of the Superior Court for the County of Marin granting the state's motion for summary judgment is set forth in Appendix D to the Petition. The opinion of the Court of Appeal of the State of California (Appendix A to the Petition) is reported at 74 Cal.App.3d 736; 141 Cal.Rptr. 810 (1977). The order of the California Supreme Court denying a hearing is set forth in Exhibit B to the Petition.

JURISDICTION

The jurisdictional requisites are set forth adequately in the Petition.

QUESTION PRESENTED

Petitioner Frisco Land and Mining Co., Inc. has not stated fairly the question in this case. The question petitioner presents in its jurisdictional statement is stated more properly as follows:

1. Did the passage and operation of the California Coastal Zone Conservation Act of 1972 uniquely effect an uncompensated taking of petitioner's property by reducing its marketability and thereby contributing to petitioner's inability to maintain a cash-flow necessary to avoid foreclosure?

2. Having failed to exhaust its administrative remedies does petitioner have a judicial remedy?

STATUTES AND REGULATIONS INVOLVED

The permit and the exemption provisions of the California Coastal Zone Conservation Act of 1972 (1972 Coastal Act) (now repealed), formerly California Public Resources Code section 27000 et seq. are involved in this Petition. That act is set out in its entirety as Appendix 1 to this brief.

STATEMENT OF THE CASE

In 1971, petitioner acquired Oceana Marin, the subdivision development involved in this action. Located at Bodega Bay, Marin County, California, it consists of five units, two of which (# 5 and # 6) petitioner alleges were taken by the passage and operation of the 1972 Coastal Act. At the outset of this action, unit # 5 was subdivided fully; however, petitioner still owned most of the lots in

that unit. Unit # 6 was not yet subdivided. Significantly, petitioner alleges a taking of unit # 6 even though the Commission was never requested to nor did it take any action whatsoever with respect to Unit # 6. The only action involving Unit # 6 was the passage of the 1972 Coastal Act, an act petitioner concedes was constitutional (Appellant's Opening Brief to the California Court of Appeal, p. 19). The events and actions relevant to petitioner's claim are as follows:

A. 1972 Coastal Act.

The California Coastal Zone Conservation Act of 1972 was enacted as an initiative measure on November 7, 1972 and became effective the following day. It was designed to halt haphazard, uncontrolled growth on the California coast and to insure development of a plan for long-term management of the natural resources of the Coastal Zone. To achieve these objectives, the Coastal Act established a state commission and six regional commissions and directed that they should develop and submit to the legislature by December 1, 1975, a comprehensive plan for management of coastal resources. The Act did not impose a development moratorium; however, to protect valuable coastal resources during the planning process, it provided that after February 1, 1973, new development must obtain permit approval from the appropriate regional commission (§ 27400). Before issuing a permit the regional commission was required to find that the proposed development would not have a substantial adverse environmental effect and that it was consistent with the policy and planning objectives of the act (§ 27402). Any aggrieved person had a right of appeal to the state commission from a permit decision of any regional commission (§ 27423).

The act specifically exempted certain classes of developments from its operation, to wit: (1) developments which obtained a constitutionally vested right prior to November 8, 1972, the effective date of the act and (2) developments which completed substantial lawful construction prior to February 1, 1973 (§ 27404) and *San Diego Regional Commission v. See the Sea, Ltd.*, 9 Cal. 3d 888 (1973). Persons who claimed to be exempt from the act were required to apply to the appropriate regional commission to have the claimed exemption recognized. Just as with permit actions, any regional commission decision on an exemption application was appealable to the state commission (§ 27423).

B. Exemption Proceedings.

On or about March 6, 1973, pursuant to section 27423 of the act petitioner filed a claim of exemption from the permit requirements of the Coastal Act with the regional commission for portions of the subdivision. It filed the claim not only on its behalf but also on behalf of all present and future lot owners at Oceana Marin. By its application appellant sought to have the commission recognize its exemption for the completion of the subdivision of unit # 5 and for the construction of single family dwellings on all lots in units 1, 3, 4 and 5. No exemption was sought with respect to unit # 6. On May 3, 1973, after a public hearing, the regional commission found that petitioner had completed 75% of the subdivision improvement work in unit 5 in reliance on valid county permits. Accordingly the regional commission recognized that petitioner was entitled to complete the subdivision of unit # 5 free from the requirements of the 1972 Coastal Act. The regional commission found also that the petitioner did not intend to develop individual lots and had no building permits for such development. The regional commission found further

that the intent of the subdivider was to sell fully subdivided but undeveloped lots to persons who might develop them in their own good time. Accordingly, the regional commission concluded that neither petitioner nor its assignees had a vested right to accomplish development of houses on the subdivided lots free from the requirements of the 1972 Coastal Act. Specifically the regional commission concluded that:

> "The erection of houses by individual purchasers on individual lots in all units will constitute separate developments within the meaning of the Coastal Zone Conservation Act and such houses are not exempt from the permit provisions of the Coastal Zone Conservation Act."

Petitioner apparently did not disagree with this decision as it took no appeal to the state commission under section 27423 and sought no judicial remedy.

C. Overall Conditions.

Subsequent to its May 3, 1973 exemption decision, the regional commission worked with the petitioner in an effort to establish a uniform set of conditions which, when satisfied, would enable it to make the findings required by section 27402 of the act and thereby enable it to grant permits to individual lot owners for construction of houses at Oceana Marin. The establishment of overall conditions for the subdivision was to serve two important purposes. First, it would allow the commission to efficiently and fully assess the impact of total buildout of the subdivision. Second, it would provide lot owners and prospective lot owners with some degree of certainty about what must be done before a permit could be obtained. This degree of certainty would tend to minimize the adverse effects on marketability of the property created by the Coastal Act's

passage and thus actually increases the marketability of the property. In spite of these facts the petitioner, in September 1973, abruptly stopped cooperating with the regional commission in its effort to develop and adopt overall conditions. Ultimately, however, the regional commission and the property owners association reached agreement on a set of conditions that satisfied the requirements of the Act but did not operate onerously on property owners at Oceana Marin. Subsequent to the establishment of the conditions, numerous property owners obtained development permits and proceeded to develop their property.

The petitioner did not appeal to the state commission the action of the regional commission adopting overall conditions. Pursuant to section 27423 that action was appealable.

ARGUMENT

A. Introduction.

The central issue before the Court is whether petitioner is precluded from bringing this action by virtue of the fact that it failed to exhaust its administrative remedies. The California Court of Appeal so held and the facts support amply that holding (Petitioner's Appendix A-42 to 51). The underlying but peripheral issue is whether, because of Petitioner's precarious liquidity position, the passage and operation of the 1972 Coastal Act uniquely effected a taking of its property. Although the California Court of Appeal addressed that issue, its analysis was dicta only and need not be considered at this time (Petitioner's Appendix A-51 to 62).

B. Exhaustion.

All of the actions which petitioner complains of were actions of the regional commission. That is because petitioner never appealed to the state commission any of the regional commission's actions. Specifically, petitioner did not appeal the regional commission decision on its exemption application nor did it appeal the action of the regional commission adopting overall conditions for the development of individual houses. Under former Public Resources Code section 27423, each of those actions was appealable. Thus petitioner did not exhaust its administrative remedies. Having failed to exhaust its administrative remedies petitioner was precluded from seeking judicial relief.

In California the doctrine of exhaustion of administrative remedies is a fundamental rule of procedure. *Abelleira v. District Court of Appeal,* 17 Cal.2d 280, 292-293 (1941). Where a plaintiff has failed to exhaust an administrative remedy, the court has no jurisdiction to adjudicate its claim. *Metcalf v. County of Los Angeles,* 24 Cal.2d 267, 269-273 (1944); and *Davis v. California Coastal Zone Conservation Commission,* 57 Cal.App.3d 700, 704-705 (1976). With respect to the 1972 Coastal Act, the doctrine applies equally to permit and exemption actions. *South Coast Regional Commission v. Gordon,* 18 Cal.3d 832, 834 (1977); *State of California v. Superior Court,* 12 Cal.3d 237 (1974).

The only exception to the doctrine is when a person challenges the constitutionality of a statute *on its face.* In that circumstance a party need only bring an action for declaratory relief. *State of California v. Superior Court, supra,* 12 Cal.3d 237, 250-252 (1974). In this case there is no assertion that the 1972 Coastal Act was unconstitutional on its face. In its opening brief to the Court of Appeal at page 19, petitioner conceded that the Act was constitutional. Accordingly the exception to the exhaustion doctrine is not applicable in this case.

The federal exhaustion rule is the same. Where a state administrative remedy exists and is not used, then the

federal courts have no jurisdiction to adjudicate whether a statute was applied properly. See *Jablon v. Trustees,* 482 F.2d 997 (9th Cir. 1973), *cert. den.;* 414 U.S. 1163 (1974); *Whitner v. Davis,* 410 F.2d 24, 31 (9th Cir. 1969); and *Sea Ranch Ass'n v. California Coastal Zone Conservation Commission,* 537 F.2d 1058 (1976). Accordingly, the California Court of Appeal had no jurisdiction to hear petitioner's claim. Similarly this court has no jurisdiction to hear petitioner's claim.

C. The Underlying Claim.

Respondent refers the court to the discussion by the Court of Appeal (Petitioner's Appendix A-51 to 62) regarding the merits of petitioner's underlying claim. In essence, that court rejected petitioner's assertion that its unique liquidity and equity position should be taken into account in determining whether an otherwise valid application of a statute effected a taking of its property. Respondent concurs with that court's analysis.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari be denied.

Respectfully submitted,

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Appendix follows

APPENDIX

Appendix I

Division 18

CALIFORNIA COASTAL ZONE CONSERVATION COMMISSION

Chapter		*Section*
1.	General Provisions And Findings And Declarations Of Policy	27000
2.	Definitions	27100
3.	Creation, Membership, And Powers Of Commisssion And Regional Commissions	27201
4.	California Coastal Zone Conservation Plan	27300
5.	Interim Permit Control	27400
6.	Penalties	27500
7.	Reports	27600
8.	Termination	27650

Division 18, addition proposed by Initiative Measure (1972), was approved by the voters at the general election held Nov. 7, 1972.

Repeal

Division 18 is repealed under the terms of section 27650 on Jan. 1, 1977.

CHAPTER 1. GENERAL PROVISIONS AND FINDINGS AND DECLARATIONS OF POLICY

Sec.

27000. Short title.
27001. Policy.

§ 27000. *Short title*

This division may be cited as the California Coastal Zone Conservation Act of 1972.

§ 27001. *Policy*

The people of the State of California hereby find and declare that the California coastal zone is a distinct and valuable natural resource belonging to all the people and existing as a delicately balanced ecosystem; that the permanent protection of the remaining natural and scenic resources of the coastal zone is a paramount concern to present and future residents of the state and nation; that in order to promote the public safety, health, and welfare, and to protect public and private property, wildlife, marine fisheries, and other ocean resources, and the natural environment, it is necessary to preserve the ecological balance of the coastal zone and prevent its further deterioration and destruction; that it is the policy of the state to preserve, protect, and, where possible, to restore the resources of the coastal zone for the enjoyment of the current and succeeding generations; and that to protect the coastal zone it is necessary:

(a) To study the coastal zone to determine the ecological planning principles and assumptions needed to ensure conservation of coastal zone resources.

(b) To prepare, based upon such study and in full consultation with all affected governmental agencies, private interests, and the general public, a comprehensive, coordinated, enforceable plan for the orderly, long-range conservation and management of the natural resources of the coastal zone, to be known as the California Coastal Zone Conservation Plan.

(c) To ensure that any development which occurs in the permit area during the study and planning period will be consistent with the objectives of this division.

(d) To create the California Coastal Zone Conservation Commission, and six regional coastal zone conservation commissions, to implement the provisions of this division.

CHAPTER 2. DEFINITIONS

Sec.

27100. Coastal zone.
27101. Coastal zone plan.
27102. Commission.
27103. Development.
27104. Permit area.
27105. Person.
27106. Sea.

§ 27100. *Coastal zone*

"Coastal zone" means that land and water area of the State of California from the border of the State of Oregon to the Republic of Mexico, extending seaward to the outer limit of the state jurisdiction, including all islands within the jurisdiction of the state, and extending inland to the highest elevation of the nearest coastal mountain range, except that in Los Angeles, Orange, and San Diego Counties, the inland boundary of the coastal zone shall be the highest elevation of the nearest coastal mountain range or five miles from the mean high tide line, whichever is the shorter distance.

§ 27101. *Coastal zone plan*

"Coastal zone plan" means the California Coastal Zone Conservation Plan.

§ 27102. *Commission*

(a) "Commission" means the California coastal zone conservation commission.

(b) "Regional commission" means any regional coastal zone conservation commission.

§ 27103. *Development*

"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision of land pursuant to the Subdivision Map Act and any other division of land, including lot splits; change in the intensity of use of water, ecology related thereto, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility, and the removal or logging of major vegetation. As used in this section, "structure" includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line.

§ 27104. *Permit area*

"Permit area" means that portion of the coastal zone lying between the seaward limit of the jurisdiction of the state and 1,000 yards landward from the mean high tide line of the sea subject to the following provisions:

(a) The area of jurisdiction of the San Francisco Bay Conservation and Development Commission, together with all contiguous areas 2,900 feet landward thereof, and any river, stream, tributary, creek, or flood control or drainage channel which flows into such area, is excluded.

(b) If any portion of any body of water, which is not subject to tidal action, lies within the permit area, the body of water together with a strip of land 1,000 feet wide surrounding it shall be included; provided, however, that this

subdivision does not apply to any river, stream, tributary, creek, or flood control or drainage channel when a portion of it lies within the permit area.

(c) Any urban land area which is (1) a residential area zoned, stabilized and developed to a density of four or more dwelling units per acre on or before January 1, 1972; or (2) a commercial or industrial area zoned, developed, and stabilized for such use on or before January 1, 1972, may, after public hearing, be excluded by the regional commission at the request of a city or county within which such area is located. An urban land area is "stabilized" if 80 percent of the lots are built upon to the maximum density or intensity of use permitted by the applicable zoning regulations existing on January 1, 1972.

Tidal and submerged lands, beaches, and lots immediately adjacent to the inland extent of any beach or of the mean high tide line where there is no beach shall not be excluded.

Orders granting such exclusion shall be subject to conditions which shall assure that no significant change in density, height, or nature of use occurs.

An order granting exclusion may be revoked at any time by the regional commission, after public hearing.

(d) Each regional commission shall adopt a map delineating the precise boundaries of the permit area within 60 days after its first meeting and file a copy of such map in the office of the county clerk of each county within its region. In delineating any inland boundary of the permit area, the regional commission may adjust such boundary by moving it seaward by not more than 50 yards. Such adjustments may only be made to avoid bisecting any lot or parcel owned by the same person or to conform to identifiable physical natural or manmade features such as streets, highways, or any structures, in order to more efficiently

carry out the provisions of Chapter 5 (commencing with Section 27400 of this division.

Underline indicates changes or additions by amendment

§ 27105. *Person*

"Person" includes any individual, organization, partnership, and corporation, including any utility and any agency of federal, state, and local government.

§ 27106. *Sea*

"Sea" means the Pacific Ocean and all the harbors, bays, channels, estuaries, salt marshes, sloughs, and other areas subject to tidal action through a connection with the Pacific Ocean, excluding nonestuarine rivers * * *, streams, tributaries, creeks and flood control and drainage channels.

CHAPTER 3. CREATION, MEMBERSHIP, AND POWERS OF COMMISSION AND REGIONAL COMMISSIONS

Article *Section*

1. Creation and Membership of Commissions and Regional Commissions 27200
2. Organization 27220
2.5 Conflicts of Interest 27230
3. Powers and Duties 27240

ARTICLE 1. CREATION AND MEMBERSHIP OF COMMISSIONS AND REGIONAL COMMISSIONS

Sec.

27200. Commission; creation; membership.
27201. Regional commissions; creation; membership.
27202. Members; selection or appointment.
27203. Alternate member; qualifications; powers and duties; expenses [New.]

ARTICLE 2. ORGANIZATION

Sec.

27220. Public members; qualifications.
27221. Members, appointment or selection; time.
27222. Cessation of membership; vacancies.
27223. Compensation; expenses.
27224. Meetings; open to public; majority vote.
27225. First meeting.
27226. Headquarters; location.

§ 27220. *Public members; qualifications*

Each public member of the commission or of a regional commission shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information, to appraise resource uses in light of the policies set forth in this division, to be responsive to the scientific, social, esthetic, recreational, and cultural needs of the state. Expertise in conservation, recreation, ecological and physical sciences, planning, and education shall be represented on the commission and regional commissions.

§ 27221. *Members; appointment or selection; time*

Each member of the commission and each regional commission shall be appointed or selected not later than December 31, 1972.

Each appointee of the Governor shall be subject to confirmation by the Senate.

§ 27222. *Cessation of membership; vacancies*

In the case of persons qualified for membership because they hold a specified office, such membership ceases when

their term of office ceases. Vacancies which occur shall be filled in the same manner in which the original member was selected or appointed.

§ 27223. *Compensation; expenses*

Except as provided in this section, members shall serve without compensation but shall be reimbursed for the actual and necessary expenses incurred in the performance of their duties to the extent that reimbursement is not otherwise provided by another public agency. All members • • • shall receive fifty dollars ($50) for each full day of attending meetings of the commission or of any regional commission.

§ 27224. *Meetings; open to public; majority vote*

The commission and regional commissions shall meet no less than once a month at a place convenient to the public. Unless otherwise provided in this division, no decision on permit applications or on the adoption of the coastal zone plan or any part thereof shall be made without a prior public hearing. All meetings of the commission and each regional commission shall be open to the public. A majority affirmative vote of the total authorized membership shall be necessary to approve any action required or permitted by this division, unless otherwise provided.
(Added by Initiative Measure approved by the electors November 7, 1972.)

§ 27225. *First meeting*

The first meeting of the commission shall be no later than February 15, 1973. The first meeting of the regional commissions shall be no later than February 1, 1973.

§ 27226. *Headquarters; location*

The headquarters of the commission shall be in a city, county, or city and county which lies, in whole or in part, within the coastal zone.

ARTICLE 2.5 CONFLICTS OF INTEREST

Sec.

27230. Appearances and actions in official capacity; certain persons prohibited.
27231. Financial interests of members of employees.
27232. Disclosure of interest; approval.
27233. Voting by county and city officials.
27234. Violations; punishment.

§ 27230. *Appearances and actions in official capacity; certain persons prohibited*

Except as hereinafter provided none of the following persons shall appear or act, in any capacity whatsoever except as a representative of the state, or political subdivision thereof, in connection with any proceeding, hearing, application, request for ruling or other official determination, judicial or otherwise, in which the coastal zone plan, or the commission or any regional commission is involved in an official capacity:

(a) Any member or employee of the commission or regional commission;

(b) Any former member or employee of the commission or regional commission during the year following termination of such membership or employment;

(c) Any partner, employer, an employee of a member or employee of the commission or any regional commission, when the matter in issue is one which is under the official responsibility of such member or employee, or in con-

nection with which such member or employee has acted or is scheduled to act, in any official capacity whatsoever.

§ 27231. *Financial interests of members or employees*

No member or employee of the commission or any regional commission shall participate, in any official capacity whatsoever, in any proceeding, hearing, application, request for ruling or other official determination, judicial or otherwise, in which any of the following has a financial interest: the member or employee himself; his spouse; his child; his partner; any organization in which he is then serving or has, within two years prior to his selection or appointment to or employment by such commission or regional commission, served, in the capacity of officer, director, trustee, partner, employer or employee; any organization within which he is negotiating for or has any arrangement or understanding concerning prospective partnership or employment.

§ 27232. *Disclosure of interest; approval*

In any case within the coverage of Section 27230, or Section 27231 when the commission determines that in any case within the coverage of such section the financial interest involved is not substantial, the prohibitions therein contained shall not apply if the person concerned advises the commission in advance of the nature and circumstances thereof, including full public disclosure of the facts which may potentially give rise to a violation of this article, and obtains from the commission a written determination that the contemplated action will not adversely affect the integrity of the commission or any regional commission. Any • • • determination made pursuant to this section shall require the affirmative vote of two-thirds of the members of the commission.

§ 27233. *Voting by county and city officials*

Nothing in this article shall preclude or prevent any member of the commission or any regional commission, or any employee thereof, who is also an employee of another public agency, a county supervisor • • •, city councilman, member of the Association of Bay Area Governments, member of the Association of Monterey Bay Associated Governments, delegate to the Southern California Association of Governments, or member of the San Diego Comprehensive Planning Organization, and who has in such designated capacity voted or acted upon a particular matter, from voting or otherwise acting upon • • • such matter • • • as a member of the commission or any regional commission, or employee thereof, as the case may be. Nothing in this section shall be construed to exempt any such member of the commission or any regional commission, or any employee thereof, from any other provision of this article.

§ 27234. *Violations; punishment*

Any person who violates any provision of this article shall, upon conviction, and for each such offense, be subject to a fine of not more than ten thousand dollars ($10,000) or imprisonment in the state prison for not more than two years, or both.

ARTICLE 3. POWERS AND DUTIES

Sec.

27240. Enumeration.
27241. Assistance from governmental agencies.
27242. Elements of California Comprehensive Ocean Area Plan; transfer to commission.
27243. Chairman; executive director.

§ 27240. *Enumeration*

The commission and each regional commission may:

(a) Accept grants, contributions, and appropriations;

(b) Contract for any professional services if such work or services cannot satisfactorily be performed by its employees;

(c) Be sued and sue to obtain any remedy to restrain violations of this division. Upon request of the commission or any regional commission, the State Attorney General shall provide necessary legal representation.

(d) Adopt any regulations or take any action it deems reasonable and necessary to carry out the provisions of this division, but no regulations shall be adopted without a prior public hearing.

§ 27241. *Assistance from governmental agencies*

The commission and regional commissions may request and utilize the advice and services of all federal, state, and local agencies. Upon request of a regional commission any federally recognized regional planning agency within its region shall provide staff assistance insofar as its resources permit.

§ 27242. *Elements of California Comprehensive Ocean Area Plan; transfer to commission*

All elements of the California Comprehensive Ocean Area Plan, together with all staff and funds appropriated or allocated to it, shall be delivered by the Governor and shall be attached and allocated to the commission at its first meeting.

§ 27243. *Chairman; executive director*

The commission and each regional commission shall each elect a chairman and appoint an executive director, who shall be exempt from civil service.

CHAPTER 4. CALIFORNIA COASTAL ZONE CONSERVATION PLAN

Article — *Section*
1. Generally 27300
2. Planning Procedure 27320

ARTICLE 1. GENERALLY

Sec.
27300. Preparation, adoption and submission to legislature.
27301. Basis of plan; studies of factors.
27302. Consistency with objective.
27303. Content.
27304. Components.

§ 27300. *Preparation, adoption and submission to legislature*

The commission shall prepare, adopt, and submit to the Legislature for implementation the California Coastal Zone Conservation Plan.

§ 27301. *Basis of plan; studies of factors*

The coastal zone plan shall be based upon detailed studies of all the factors that significantly affect the coastal zone.

§ 27302. *Consistency with objectives*

The coastal zone plan shall be consistent with all of the following objectives:

(a) The maintenance, restoration, and enhancement of the overall quality of the coastal zone environment, including, but not limited to, its amenities and aesthetic values.

(b) The continued existence of optimum populations of all species of living organisms.

(c) The orderly, balanced utilization and preservation, consistent with sound conservation principles, of all living and nonliving coastal zone resources.

(d) Avoidance of irreversible and irretrievable commitments of coastal zone resources.

§ 27303. *Content*

The coastal zone plan shall consist of such maps, text and statements of policies and objectives as the commission determines are necessary.

§ 27304. *Components*

The plan shall contain at least the following specific components:

(a) A precise, comprehensive definition of the public interest in the coastal zone.

(b) Ecological planning principles and assumptions to be used in determining the suitability and extent of allowable development.

(c) A component which includes the following elements:

(1) A land-use element.

(2) A transportation element.

(3) A conservation element for the preservation and management of the scenic and other natural resources of the coastal zone.

(4) A public access element for maximum visual and physical use and enjoyment of the coastal zone by the public.

(5) A recreation element.

(6) A public services and facilities element for the general location, scale, and provision in the least environmentally destructive manner of public services and facilities in the coastal zone. This element shall include a power plant siting study.

(7) An ocean mineral and living resources element.

(8) A population element for the establishment of maximum desirable population densities.

(9) An educational or scientific use element.

(d) Reservations of land or water in the coastal zone for certain uses, or the prohibition of certain uses in specific areas.

(e) Recommendations for the governmental policies and powers required to implement the coastal zone plan including the organization and authority of the governmental agency or agencies which should assume permanent responsibility for its implementation.

ARTICLE 2. PLANNING PROCEDURE

Sec.

27320. Publication of objectives, guidelines, etc. by commission recommendations by regional commissions.

§ 27320. *Publication of objectives, guidelines, etc. by commission; recommendations by regional commissions*

(a) The commission shall, within six months after its first meeting, publish objectives, guidelines, and criteria for the collection of data, the conduct of studies, and the preparation of local and regional recommendations for the coastal zone plan.

(b) Each regional commission shall, in cooperation with appropriate local agencies, prepare its definitive conclusions and recommendations, including recommendations for areas that should be reserved for specific uses or within which specific uses should be prohibited, which it shall, after public hearing in each county within its region, adopt and submit to the commission no later than April 1, 1975.

(c) On or before December 1, 1975, the commission shall adopt the coastal zone plan and submit it to the Legislature for its adoption and implementation.

CHAPTER 5. INTERIM PERMIT CONTROL

Article *Section*
1. General Provisions 27400
2. Permit Procedure 27420

ARTICLE 1. GENERAL PROVISIONS

Sec.
27400. Necessity of permit.
27401. Developments requiring two-thirds vote.
27402. Findings by regional commissions.
27403. Terms and conditions.
27404. Vested rights.
27405. Exemptions; residences; maintenance of navigation channels; other repair or maintenance activities.

§ 27400. *Necessity of permit*

On or after February 1, 1973, any person wishing to perform any development within the permit area shall obtain a permit authorizing such development from the regional commission and, if required by law, from any city, county, state, regional or local agency.

Except as provided in Sections 27401 and 27422, no permit shall be issued without the affirmative vote of a majority of the total authorized membership of the regional commission, or of the commission on appeal.

§ 27401. *Developments requiring two-thirds vote*

No permit shall be issued for any of the following without the affirmative vote of two-thirds of the total authorized membership of the regional commission, or of the commission on appeal:

(a) Dredging, filling, or otherwise altering any bay, estuary, salt marsh, river mouth, slough, or lagoon.

(b) Any development which would reduce the size of any beach or other area usable for public recreation.

(c) Any development which would reduce or impose restrictions upon public access to tidal and submerged lands, beaches and the mean high tideline where there is no beach.

(d) Any development which would substantially interfere with or detract from the line of sight toward the sea from the state highway nearest the coast.

(e) Any development which would adversely affect water quality, existing areas of open water free of visible structures, existing and potential commercial and sport fisheries, or agricultural uses of land which are existing on the effective date of this division.

§ 27402. *Findings by regional commissions*

No permit shall be issued unless the regional commission has first found, both of the following:

(a) That the development will not have any substantial adverse environmental or ecological effect.

(b) That the development is consistent with, the findings and declarations set forth in Sections 27001 and with the objectives set forth in Section 27302.

The applicant shall have the burden of proof on all issues.

§ 27403. *Terms and conditions*

All permits shall be subject to reasonable terms and conditions in order to ensure:

(a) Access to publicly owned or used beaches, recreation areas, and natural reserves is increased to the maximum extent possible by appropriate dedication.

(b) Adequate and properly located public recreation areas and wildlife preserves are reserved.

(c) Provisions are made for solid and liquid waste treatment, disposition, and management which will minimize adverse effects upon coastal zone resources.

(d) Alterations to existing land forms and vegatation, and construction of structures shall cause minimum adverse effect to scenic resources and minimum danger of floods, landslides, erosion, siltation, or failure in the event of earthquake.

§ 27404. *Vested rights*

If, prior to * * * November 8, 1972, any city or county has issued a building permit, no person who has obtained a vested right thereunder shall be required to secure a permit from the regional commission; providing that no substantial changes may be made in any such development, except in accordance with the provisions of this division. Any such person shall be deemed to have such vested rights if, prior to * * * November 8, 1972, he has in good faith and in reliance upon the building permit diligently commenced construction and performed substantial work on the development and incurred substantial liabilities for work and materials necessary therefor. Expenses incurred in obtaining the enactment of an ordinance in relation to the particular development or the issuance of a permit shall not be deemed liabilities for work or material.

§ 27405. *Exemptions; residences; maintenance of navigation channels; other repair or maintenance activities*

Notwithstanding any provision in this chapter to the contrary, no permit shall be required for the following types of development:

(a) Repairs and improvements not in excess of seven thousand five hundred dollars ($7,500) to existing single-

family residences; provided, that the commission shall specify by regulation those classes of development which involve a risk of adverse environmental effect and may require that a permit be obtained.

(b) Maintenance dredging of existing navigation channels or moving dredged material from such channels to a disposal area outside the permit area, pursuant to a permit from the United States Army Corps of Engineers.

(c) Repair or maintenance activities of any sort; provided, that such activities do not result in an addition to, or enlargement or expansion of, the object of such repair or maintenance activities.

ARTICLE 2. PERMIT PROCEDURE

Sec.

27420. Applications; fees; appropriation; hearings; appeal.
27421. Local permits; copy to regional commission.
27422. Emergency issuance, notice and hearing on non-emergency permits.
27423. Appeals to commission.
27424. Judicial review.
27425. Actions for declaratory and equitable relief.
27426. Actions for civil penalties.
27427. Additional remedies.
27428. Costs; attorney fees.

§ 27420. *Applications; fees; appropriation; hearings; appeal*

(a) The commission shall prescribe the procedures for permit applications and their appeal and may require a reasonable filing fee and the reimbursement of expenses. All such fees and reimbursements collected heretofore or

hereafter shall be credited to, and shall be in augmentation of, the appropriation made in Section 4 of Proposition 20 as approved by the electorate at the general election on November 7, 1972, and are hereby appropriated to the commission for the same period and for the same purposes as set forth therein.

(b) The regional commission shall give written public notice of the nature of the proposed development and of the time and place of the public hearing. Such hearing shall be set no less than 21 nor more than 90 days after the date on which the application is filed.

(c) The regional commission shall act upon an application for permit within 60 days after the conclusion of the hearing and such action shall become final after the 10th working day unless an appeal is filed within that time.

§ 27421. *Local permits; copy to regional commission*

Each unit of local government within the permit area shall send a duplicate of each application for a development within the permit area to the regional commission at the time such application for a local permit is filed, and shall advise the regional commission of the granting of any such permit.

§ 27422. *Emergency issuance; notice and hearing on nonemergency permits.*

The commission shall provide, by regulation, for the issuance of permits by the executive directors without compliance with the procedure specified in this chapter in cases of emergency or for repairs or improvements to existing structures not in excess of twenty-five thousand dollars ($25,000) and other developments not in excess of ten thousand dollars ($10,000). Nonemergency permits shall not be effective until after reasonable public notice and

adequate time for the review of such issuance has been provided. If any two members of the regional commission so request at the first meeting following the issuance of such permit, such issuance shall not be effective and instead the application shall be set for a public hearing pursuant to the provisions of Section 27420.

§ 27423. *Appeals to commission*

(a) An applicant, or any person aggrieved by approval of a permit by the regional commission, may appeal to the commission.

(b) The commission may affirm, reverse, or modify the decision of the regional commission. If the commission fails to act within 60 days after notice of appeal has been filed, the regional commission's decision shall become final.

(c) The commission may decline to hear appeals that it determines raise no substantial issues. Appeals it hears shall be scheduled for a de novo public hearing and shall be decided in the same manner and by the same vote as provided for decisions by the regional commissions.

§ 27424. *Judicial review*

Any person, including an applicant for a permit, aggrieved by the decision or action of the commission or regional commission shall have a right to judicial review of such decision or action by filing a petition for a writ of mandate * * * in accordance with the provisions of Chapter 2, (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, within 60 days after such decision or action has become final.

§ 27425. *Actions for declaratory and equitable relief*

Any person may maintain an action for declaratory and equitable relief to restrain violation of this division. No bond shall be required for an action under this section.

§ 27426. *Actions for civil penalties*

Any person may maintain an action for the recovery of civil penalties provided in Sections 27500 and 27501.

§ 27427. *Additional remedies*

The provisions of this article shall be in addition to any other remedies available at law.

§ 27428. *Costs; attorney fees*

Any person who prevails in a civil action brought to enjoin a violation of this division or to recover civil penalties shall be awarded his costs, including reasonable attorneys fees.

CHAPTER 6. PENALTIES

Sec.

27500. Civil fine.
27501. Additional penalties.

§ 27500. *Civil fine*

Any person who violates any provision of this division shall be subject to a civil fine not to exceed ten thousand dollars ($10,000).

§ 27501. *Additional penalties*

In addition to any other penalties, any person who performs any development in violation of this division shall be subject to a civil fine not to exceed five hunderd dollars ($500) per day for each day in which such violation persists.

CHAPTER 7. REPORTS

Sec.

27600. Annual filing.

§ 27600. *Annual filing*

(a) The commission shall file annual progress reports with the Governor and the Legislature not later than the fifth calendar day of the 1974 and 1975 Regular Session of the Legislature, and shall file its final report containing the coastal zone plan with the Governor and the Legislature not later than the fifth calendar day of the 1976 Regular Session of the Legislature.

CHAPTER 8. TERMINATION

Sec.

27650. Duration of division.

§ 27650. *Duration of division*

This division shall remain in effect until January 1, 1977, and as of that date is repealed.